Supreme Court, U.S.
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No. ———

In the Supreme Court of the United States

NANCY L. KAHN,
Petitioner,

v.

DEAN & FULKERSON, P.C., et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case was brought under the Equal Pay Act (29 U.S.C. § 206(d)(1)) and Michigan's Elliott Larsen Civil Rights Act. MCLA § 37.2202(1)(a). It involves a law firm (Respondents) that utilizes a mathematical compensation formula for attorneys based on financial productivity. The law firm compensated the female Petitioner by a grossly reduced compensation formula, citing as a defense "conduct" which was unrelated to financial productivity and which did not affect the compensation of male attorneys. Summary disposition was granted to Respondents. The questions presented are:

1. What is the quantum of proof necessary for a Plaintiff, who has been found by the District Court and the Court of Appeals to have made out a prima facie case under the Equal Pay Act, to avoid summary disposition in favor of the defendants?

2. When an action has been brought under the Equal Pay Act (as well as a state statute prohibiting gender discrimination such as Michigan's Elliott Larsen Civil Rights Act) may the Court of Appeals place a greater burden of disproving pretext on an Equal Pay plaintiff than this Court unanimously specified for discrimination cases in Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133; 120 S. Ct. 2097, 147 L.Ed. 2d 105 (2000)

3. Is an Equal Pay and discrimination Plaintiff, who has been found to have made out a prima facie case under both statutes, properly required to offer direct evidence of the defendants' state of mind (i.e. that they did not "honestly" believe their asserted

nondiscriminatory reason) in order to avoid summary disposition in favor of the defendants?

PARTIES TO THE PROCEEDINGS

Petitioner

Nancy L. Kahn, an individual with no corporate affiliations.

Respondents

Dean & Fulkerson, P.C., Larry M. Bolton, George Burnard, Read A. Cone, III, William G. Coon, James P. Dean, John L. Gierak, Paul R. Gilleran, Jerome C. Gropman, Clarence L. Hudson, Jeffrey L. Hudson, Ian R. Hunter, Janet E. Lanyon, Laurence M. Luke, Thomas P. Martin, Paul J. Mastrangel, Robert L. Mercado, Donald A. Pierce, Jr., David L. Tennent, Richard J. Tennent, and Carol L. Vondale

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In Reeves v. Sanderson, 530 U.S. 133; 120 S. Ct. 2097; 147 L.Ed. 2d 105 (2000), this Court clarified the quantum and type of proof necessary for a discrimination plaintiff to survive a defense motion for summary disposition, concluding, among other things, that (1) discrimination claims are principally based on circumstantial evidence since eyewitness testimony to the employers' mental processes is seldom available, (2) that the trier of fact may consider the inferences properly drawn from Plaintiff's prima facie case in deciding the issue of pretext, and (3) the inference of discrimination may be drawn from the Defendant's assertion of a false reason for its action.

Some circuits are refusing to apply these evidentiary rules for determining pretext to Equal Pay Act claims, which results in a much higher burden of proof being placed on Equal Pay Act plaintiffs than on discrimination plaintiffs, contrary to this Court's prior holdings.

II. CIRCUIT SPLIT. 12

There is a conflict among the circuits concerning the quantum of proof necessary for an Equal Pay Plaintiff, who has made out a prima facie case, to survive a defendant's

motion for summary disposition.

III. THE QUESTION PRESENTED IS IMPORTANT. 15

The subject ruling results in the intent of Congress being thwarted because the Sixth Circuit's rejection of virtually all viable methods of proving pretext and discrimination adversely impacts members of the protected class and eradicates the benefits and the Congressional purpose of the Equal Pay Act. The dismissal of Equal Pay claims without trial, even in cases like this where mathematical compensation formulas based on productivity are being applied to men, but refused to women on the flimsiest of subjective reasons, results in the intent and the enforceability of the Equal Pay Act being thwarted.

IV. THE MAJORITY DECISION OF THE COURT OF APPEALS IS ERRONEOUS. 20

The Majority Decision of the Court of Appeals is erroneous, placing on Equal Pay plaintiffs the virtually impossible burden of having to produce direct evidence refuting the defendants' inevitable testimony about their nondiscriminatory state of mind. Moreover, the Majority Opinion permitted the employer to disavow its established compensation criteria, and justify the female Petitioner's drastically substandard pay based on ill defined

"conduct." This rationale is insufficient to provide an Equal Pay defense, as a matter of law, because male attorneys' compensation was based solely on a financial productivity formula and not "conduct."

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Petitioner respectfully petitions for a Writ of Certiorari to review the majority opinion of the Sixth Circuit Court of Appeals in this case, or for such other relief as the Court deems appropriate.

OPINIONS BELOW

The Sixth Circuit issued majority and dissenting Opinions in this case on November 13, 2000. (App. A, pp. 1a-23a). The Sixth Circuit denied Petitioner's Motion for Reconsideration with Suggestion for Rehearing En Banc on January 12, 2001. (App. D, pp. 70a-71a).

The District Court granted Respondents' Motion for Summary Disposition and denied Petitioner's Motion for Summary Disposition under the Equal Pay Act by Opinion dated August 5, 1998. (App. C, pp. 49a-69a). In Response to Petitioner's Motion for Reconsideration, the District Court issued an additional 14 page opinion dated November 25, 1998. (App. B, pp. 32a-48a).

STATEMENT OF JURISDICTION

The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1) and Michigan's Elliott Larsen Civil Rights Act, MCLA § 37.2202(1)(a), both of which prohibit wage discrimination on the basis of gender. (See statutory language at App. I, p.85a-86a).

STATEMENT OF THE CASE

I. THE EQUAL PAY ACT AND DISCRIMINATION CLAIMS.

This is an Equal Pay Act case (with additional counts of gender discrimination and breach of contract under state law) brought by the attorney Petitioner against the Respondent law firm. The facts are relatively simple because the Respondent law firm has a mathematical productivity-based compensation formula that applies to all attorneys with their own clientele, shareholders and non-shareholders alike. There are no salaries or even draws; the formula is simply applied to incoming receipts. The Respondents failed and refused to compensate Petitioner by its standard formula and used a grossly reduced formula for the first year, which the Respondents then unilaterally extended for a second year.

It is undisputed that Respondents were interested in establishing an environmental practice and that Petitioner approached the Respondent firm with regard to bringing her environmental practice and joining their firm. Respondents' documents confirm that Petitioner was "drawn to their (financial) system" and "willing to take the risk associated with it except for a 60-90 day deferral of expenses" (which Respondents' accountant later admitted was automatically granted to everyone). (See quote at Maj. Op.; App. A, p.4a), and Respondents' Memorandum of 03/16/94; App. E, pp. 72a-73a).

Respondents' ultimately offered Petitioner a reduced compensation formula for the "first 12 months of employment," projecting their proposed profits on such a reduced formula in writing. (Respondents' Memorandum of 04/13/94; App. G, p. 79a). They took no such profits from

male attorneys joining the firm with their own clientele, even those who, like Petitioner, were not shareholders.[1] Petitioner's reduced compensation, like the standard formula, had no salary or draw, only a portion of paid receipts.

At the end of Petitioner's first year, Respondents were making very substantial profits off of Petitioner's practice which they did not make off of any male attorney's practice. They refused to increase her compensation to the standardized formula at that time. Petitioner was the first female attorney who would have been compensated as highly under the formula as some of the more influential men (e.g. the President of the firm and the head of the Professional Personnel Committee).

Petitioner's losses include wage differential of $28,000 the first year, and $96,000 the second year, as well as her nondiscriminatory share of a $300,000 success fee which the firm received in substantial part for work done by Petitioner.[2]

When Petitioner continued her objections to the inequitable compensation, Respondents unilaterally deducted thousands of dollars more from Petitioner's compensation each month for the pay of an extra one half (½) secretary and for unpaid client expenses. As Respondents continued to

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[1] The attorney which all of the Courts found to be similarly situated to Petitioner was James O'Brien, who entered the firm as a non-shareholder with his own clientele, who estimated the same projected revenues as Petitioner, but who actually generated much lower revenues than Petitioner. He was given the standard compensation formula and not the reduced one.

[2] Respondents hid the fee in a trust account and denied both the existence and later the amount of the fee, upon specific inquiry by Petitioner.

enlarge the types of "deductions" from Petitioner's compensation, they also interfered with and threatened to fire her assigned secretary, the combination of which resulted in Petitioner's constructive discharge.

A. Asserted Defense for Reduced Wages During First Year with Firm.

Respondents' first asserted defense for the first "developmental year's" wage differential was that Petitioner rejected the standard formula when she asked for a 60 - 90 day expense deferral. This argument was refuted, however, by Respondents' accountant's testimony to the effect that all attorneys were automatically given that type of expense deferral.

Respondents later argued that they were "prepared" to offer Petitioner shareholder status and the full compensation formula, but Petitioner wanted the reduced formula. This was refuted by Respondents' 03/29/94 Memo which confirms that Petitioner was willing to take the risk inherent in their system, that she wanted only the standard 60 - 90 day expense deferral, and that she was "drawn" to Respondents' financial system. (App. E, pp. 72a-73a). Respondents' meeting Minutes also confirm that the only memos and recommendations to their Board involved the proposal of a reduced compensation formula for "the first 12 months of employment" and projected the profits they could obtain therefrom. (Respondents' Minutes of Special Meeting April 13, 1994; App. G, pp. 76a-80a).

B. Asserted Defense for Reduced Wages During Second Year with Firm.

Most of Petitioner's damages were incurred after the first "developmental year." Respondents' asserted defense to continuing the reduced compensation formula at the end of the first 12 months of employment was that Petitioner would have received the standardized compensation formula "but for her conduct" (Respondents' Brief on Appeal, p. 24). The "conduct" asserted by Respondents as their nondiscriminatory reason was not specified in their Answers to Interrogatories or documented. The description of the "conduct" relied on has varied during the course of this case, as will be discussed in greater detail in the body of this Petition.

II. THE PROCEEDINGS BELOW.

A. District Court Opinion I.

The District Court disposed of the case before trial, granting Respondents' Motion for Summary Disposition without hearing. In its first opinion the District Court conceded that the Petitioner had made out a prima facie case under the Equal Pay Act and that one James O'Brien was an example of a similarly situated male employee who was not a shareholder, was less senior than Petitioner, had lower production than Petitioner, and still received the more generous compensation formula. The District Court went on to conclude, however, that "Defendants have shown that any pay differential between Plaintiff and O'Brien was based upon Plaintiff's request for a deferral of expenses and her interest in negotiating a contract arrangement for her first year on the job." (Dist. Ct. Op. I; App. C, p. 62a). The District Court required only that the Defendants "present admissible evidence," of a nondiscriminatory reason in order to secure

summary disposition. (Dist. Ct. Op. I; App. C, p. 64a).

B. District Court Opinion II.

Petitioner filed a Motion for Reconsideration based on Respondent's Accountant's testimony that the 90 day expense deferral requested by Petitioner was standard procedure at the law firm and was granted to all male attorneys (including O'Brien) whether they asked for it or not. The Motion was also based on the undisputed fact that the similarly situated male attorney (O'Brien) also had negotiated a contract arrangement for his first year on the job.

The District Court then issued a new 13 page Opinion dated November 25, 1998, which sought to justify the Court's earlier decision, albeit on somewhat different factual findings, all of which were contrary to Petitioner's testimony and, in most cases, contrary to the documented admissions of the Respondents on the record.

C. Court of Appeals Majority Opinion.

Petitioner appealed the grant of Summary Disposition to the Respondents and the denial of Petitioner's Motion for Summary Disposition under the Equal Pay Act to the Sixth Circuit.

The Majority Opinion issued by the Sixth Circuit also agreed that Petitioner made a prima facie case under both the Equal Pay Act and Michigan's discrimination statute. The Majority declined, however, to consider the circumstantial and direct evidence of pretext, or the conclusions that could have been drawn by the jury from Petitioner's prima facie case. The Court declined to acknowledge the appropriate methods of proving pretext announced by this Court in Reeves

v. Sanderson, 530 U.S. 133; 120 S. Ct. 2097; 147 L.Ed. 2d 105 (2000). The Majority went so far as to specify that Respondents were entitled to summary disposition because there was no (direct) evidence that Respondents did not "honestly" believe the defenses to which they were testifying. (Maj. Op.; App. A, p. 18a).

D. Court of Appeals Dissent.

A strong dissent accompanied the Majority Opinion, citing some of the undisputed evidence that compelled a finding of pretext, including the Respondents' repeated written statements congratulating Petitioner on her excellent work, the absence of any negative documentation, Petitioner's high levels of financial productivity, and the pivotal fact that none of the "nondiscriminatory" reasons asserted by Defendants had anything to do with the pay criteria for male attorneys. The dissent concluded that "at minimum" Petitioner was entitled to a jury trial.[3]

REASONS FOR GRANTING THE WRIT

I. THE REFUSAL OF THE MAJORITY OPINION TO ALLOW THE METHODS OF PROVING PRETEXT ANNOUNCED BY THIS COURT IN REEVES V. SANDERSON, SUPRA, RESULTS IN THE PLACEMENT OF A GREATER BURDEN OF PROVING PRETEXT ON EQUAL PAY ACT PLAINTIFFS, THAN ON DISCRIMINATION

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[3] The Briefs before the Sixth Circuit were due before Reeves v. Sanderson was decided so the Reeves opinion was cited to the Court in a letter pursuant to Sixth Circuit Rules. Reeves was also cited during oral argument and briefed extensively in the post opinion Motion for Rehearing With Suggestion for Rehearing En Banc.

PLAINTIFFS, CONTRARY TO THIS COURT'S PRIOR RULINGS AND THE LANGUAGE OF THE RESPECTIVE STATUTES.

In Reeves v. Sanderson, supra, this Court clarified the quantum and type of proof necessary for a discrimination plaintiff to survive a defense motion for summary disposition once the Plaintiff has made out a prima facie case. This Court concluded, among other things, that (1) discrimination claims are principally based on circumstantial evidence since eyewitness testimony to the employers' mental processes is seldom available, (2) the trier of fact may consider the inferences properly drawn from Plaintiff's prima facie case in deciding the issue of pretext, (3) the inference of discrimination may be drawn from the Defendant's assertion of a false reason for its action, (4) the court may not make credibility determinations and, (5) the court must disregard all evidence favorable to the moving party that the jury is not required to believe.

A comparison of the holdings in Reeves, and the conclusions of the majority opinion in this case, disclose that the majority opinion refused to apply each and every one of the principles and holdings announced in Reeves, supra. It appears that the Sixth Circuit Majority concluded that it could disregard the Reeves analysis regarding the types of proofs that may establish pretext, since Reeves was a discrimination case and the subject case was brought under the Equal Pay Act.

This Court has an interest in correcting the Sixth Circuit Majority's faulty reasoning because it results in a discrimination Plaintiff (who bears the burden of proof throughout her case) having a much lighter burden of proving pretext than an Equal Pay Plaintiff who has established a

prima facie case, and is thereafter not supposed to have any burden at all.[4] (Corning Glass Works, Inc. V. Brennan, 417 U.S. 188, 94 S. Ct. 2223; 41 L.Ed. 2d 1 (1974)). (Once the Equal Pay plaintiff establishes a prima facie case, a heavy burden shifts to defendants to prove one of the four statutory affirmative defenses).[5] The rejection of Reeves by the Sixth Circuit Majority Opinion also serves as a refusal to apply fundamental evidentiary principles which may be used to prove pretext regardless of the cause of action involved.[6]

Examples of the rejection of each of this Court's rulings in Reeves by the Sixth Circuit Majority Opinion are as follows:

• This Court concluded in Reeves that most discrimination cases must be accepted on circumstantial evidence because eyewitness testimony to the employer's mental processes is rarely available. In Reeves, this Court ruled that it was error for the circuit court to require direct evidence regarding the Defendants' state of mind. (Reeves, supra, 530 U.S. at 141, 146). The Majority Opinion, however, like the Circuit Court in Reeves required direct evidence that the Respondents did not "honestly" believe the

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[4] The Sixth Circuit Dissent reached this conclusion at p. 2 of its Opinion. (App. A, p. 25a).

[5] For a more detailed explanation of Congress' intent with respect to these relative burdens of proof, see County of Washington v. Gunther, 452 U.S. 161, 166-171, 101 S. Ct. 2242; 68 L.Ed. 2d 751 (1981).

[6] The Sixth Circuit majority should also have recognized the applicability of Reeves for both the discrimination and equal pay counts. Michigan courts construe the Elliott Larsen Discrimination Statute as following federal rulings regarding proof of pretext. (Town v. Michigan Bell, 455 Mich. 688, 697-8, 568 N.W. 2d 164 (1997)).

defenses to which they were testifying. (Maj. Op.; App. A, p. 18a).

• The Majority Opinion refused to consider the inferences that could be drawn from the Plaintiff's prima facie case, contrary to the ruling in Reeves. Those inferences were particularly strong in this case where the Petitioner's salary differential was close to $100,000 per year, where the Respondents' compensation system was a written formula based on financial productivity, and the Respondents attempted to argue that Petitioner's high level of productivity was irrelevant and that the refusal to pay her equally was based on "conduct" that did not affect the compensation of male attorneys. (Respondents' Brief on Appeal, pp. 24, 34). The Dissenting Opinion, without acknowledging Reeves, recognized the inferences to be drawn from the gross wage disparity under the circumstances.

• The Majority Opinion also refused to follow the ruling in Reeves that discrimination may be inferred from the defendants' assertion of a false reason for their actions. (Reeves, supra, 530 U.S. at 147). That inference is particularly compelling here given the fact that the Respondents' explanation of the reasons for the gross wage differential are irreconcilably at odds with their own Meeting Minutes. (See p. 23-26 of Petition).

• The Majority Opinion refused to consider discriminatory statements directly regarding the reduced salary needs of women with working husbands and the reduced value of a female employee with "preexisting commitments." (Undisputedly a reference to children). (Dist. Ct. Op. I; App. C, p. 53a). (Maj. Op.; App. A, p. 19a). These comments were both made at the time of Petitioner's hire; the first statement by the Respondent who

was responsible for recommending an initial reduced salary for Petitioner and for recommending its continuation in lieu of equal pay. The second comment was made by the Respondent who initially tried to deflect Petitioner's inquiries regarding employment. The Court in Reeves ruled that it was error to disregard such statements in deciding summary disposition and that the weight to be accorded such statements was to be determined by the jury. (Reeves at supra, 530 U.S. at 151-153).

- The Reeves holding precluded the court from making credibility determinations in deciding summary disposition. Id. This was also ignored by the Majority Opinion, which concluded that there was "no material issue on the credibility of Respondents explanation." (Maj. Op.; App. A, p. 22a).

- Finally, the Sixth Circuit rejected the Reeves holding that the Court must disregard all evidence favorable to the moving party that the jury is not required to accept. The Sixth Circuit ruled that Respondent Coon "was prepared" to offer the Petitioner equal compensation but he thought she did not want it. (Maj. Op.; App. A, p. 16a). This curious ruling was directly contrary to the Respondent's own documents and was apparently based on their "after the fact" testimony as to what they were thinking at the time of hire. It was hardly something that the jury was required to accept.

The effect of the Majority Opinion's rejection of every aspect of the ruling in Reeves is that an Equal Pay Act Plaintiff is being denied each and every available method of proving pretext available to discrimination plaintiffs. This results in the placement of a much higher (almost impossible) burden of proof on an Equal Pay Plaintiff once her Prima Facie case has been established. This is contrary to the established rule that the Equal Pay plaintiff is not intended to

have any burden of proof once her prima facie case has been established, while in discrimination cases the burden of proof remains on the plaintiff throughout the case, including the introduction of evidence proving pretext.

II. THERE IS A CIRCUIT SPLIT REGARDING THE QUANTUM OF PROOF NECESSARY FOR AN EQUAL PAY PLAINTIFF TO SURVIVE A MOTION FOR SUMMARY DISPOSITION WHEN THE PLAINTIFF HAS BEEN FOUND BY THE COURT TO HAVE MADE OUT A PRIMA FACIE CASE.

A review of Equal Pay Act ("EPA") cases discloses a great variation in both the description and the application of the burden of proof necessary for an EPA Plaintiff, who has already been determined by the Court to have made out a prima facie case, to avoid summary disposition against her. In recent years the split has become much more overt, with the Circuits articulating their disagreement with each other with respect to the standard applied. For example, the 6th Circuit specifically disagrees with the burden applied by the 11th Circuit:

> The Eleventh Circuit has held with respect to this issue that "[w]hen the defendant overcomes the burden, the plaintiff must rebut the explanation by showing with affirmative evidence that it is pretextual or offered as a post-event justification for a gender based differential." Irby v. Bittick, 44 F. 3d 949, 954 (11th Cir. 1995). We disagree with this characterization of the plaintiff's and defendant's respective burdens under the EPA. The Eleventh Circuit improperly shifts the

> burden of persuasion to the plaintiff on the affirmative defense issues. In an EPA case, the defendant always bears the burden of proving that its proffered reason is the true basis for the pay differential. The EPA plaintiff bears the burden of producing evidence of pretext solely where a reasonable jury viewing the defendant's evidence could find only for the defendant; the plaintiff, however, never bears the burden of persuasion regarding the affirmative defenses. Buntin v. Breathitt County Board of Education, 134 F.3d 796, 800 n. 7 (6th Cir. 1998).[7]

The confusion and inconsistency expressed by the 6th and the 11th Circuits on this issue are not isolated cases. Although this Court issued a comprehensive opinion regarding the legislative intent and the burdens of proof under the EPA in Corning Glass Works v. Brennan, supra, there has been little amplification by this Court on the EPA since that time.[8] Most

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[7] The Court in Irby leaves no doubt as to the heavy burden placed on Plaintiff. In § C, the Court confirmed that there was no dispute that Plaintiff "performs the same work involving identical skill, effort, responsibility and working conditions." The pay differential was staggering (over 50%). Yet the Eleventh Circuit specified that Plaintiff could not survive a defense motion for summary judgment because she had the burden of proving pretext. Irby v. Bittick, 44 F.3d 949, n. 8 (11th Cir. 1995).

[8] County of Washington v. Gunther, supra, addressed the sole issue of whether the failure of a Title VII Plaintiff to prove that a male employee had an equal job at a higher rate of pay, in itself, precludes proceeding under Title VII. Nonetheless, Gunther did provide a good comparison of the differences between the respective burdens of proof that were intended by Congress in EPA and Title VII, even when both claims involve gender based wage disparity.

federal Courts' still cite and rely on this Court's 1974 decision in the Corning Glass Works case in dealing with EPA burden proof issues, with highly inconsistent results, particularly in cases where the Plaintiff has proved a prima facie case.

- The Tenth Circuit takes the position (and Petitioner here agrees) that once the plaintiff establishes a prima facie case under the Equal Pay Act, a Defendant with allegations supporting a legally sufficient affirmative defense must persuade the jury as to its affirmative defense. If defendant fails to persuade the jury with its evidence of one or more of the "affirmative defenses", then plaintiff will prevail on her prima facie case. Tidwell v. Fort Howard Corp., 989 F.2d 406, 409 (10th Cir. 1993).

- The Second Circuit's position is more equivocal. It has ruled that in order to survive a defense motion for summary disposition an EPA Plaintiff need only show that she is doing the same work as the male employees, but being paid less.

> "[Plaintiff] has already made a showing sufficient to defeat the school district's motion for summary judgment, that she is doing custodian's work and being paid less than male custodians." Aldrich v. Randolph Cent. School District, 963 F.2d 520, 527 (2nd Cir. 1992).

- More recently, however, the Second Circuit seems to suggest a subsequent shifting of the burden back to the Plaintiff, ruling that "the Plaintiff may counter the employer's affirmative defense by producing evidence that the reasons the Defendant seeks to advance are actually a pretext for sex discrimination." Ryduchowski v. Port Authority, 203 F.3d

135, 142 (2nd Cir. 2000).

- The published District Court opinions in the various circuits echo this confusion and inconsistency. In Pennsylvania, the Federal District Court also rules that "the burden shifts" back to the EPA plaintiff to show pretext, making the burden of proof virtually indistinguishable from Title VII. Byrnes v. Herion, Inc., 757 F. Supp. 648 (W. D. Pa. 1990).

- Similarly, in Hatcher-Capers v. Haley, 762 F. Supp. 393, (D. D.C. 1991), the Court ruled that once the employer has demonstrated some non discriminatory reason for a payment policy challenged as violating the Equal Pay Act, the burden shifts back to the employee (Plaintiff) to produce evidence sufficient to raise an inference that the proffered reason is not legitimate and serves merely as cover for sex-based discrimination. The Court noted that the same evidence supporting the employee's prima facie case under the EPA would rarely be deemed competent by that Court of to rebut the employer's showing of a legitimate business reason for the pay differential. (See also, Derouin v. Litton Industrial Products, Inc., 618 F. Supp. 221, 224 (D.C. Wis. 1984).

Thus, a review of opinions from the Circuits and the District Courts demonstrate there is an articulated split between the circuits as to the burden of proof under the Equal Pay Act once the plaintiff has been determined to have established a prima facie case.

III. THE INTENT OF CONGRESS IS BEING THWARTED.

A. Congressional Intent in Passing the Equal Pay Act.

The intent of Congress in passing the Equal Pay Act was identified by this Court in Corning Glass Works v. Brennan, supra, 417 U.S. at 195 as follows:

> "Congress' purpose in enacting the Equal Pay Act was to remedy . . . the fact that the wage structure of many segments of American industry has been based on an ancient but outmoded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same. S. Rep. No. 176, 8th Cong., 1st Sess., 1 (1963).

Ironically these Respondents expressed the very approach that Congress was trying to eradicate by the Act. Defendant Coon, at the time of Petitioner's hire, specified that the only other married female attorney at the firm did not need the money she earned from working because her husband was an attorney. (Maj. Op.; App. A, p. 19a). (At the time this statement was made, Defendant Coon was aware that Petitioner's husband was also an attorney). The statement reflects the viewpoint that female attorneys should not be considered as primary breadwinners, but merely as helpers. This is the attitude that Congress specifically desired to stop influencing compensation decisions.

At the time of Petitioner's hire Defendant Mastrangel expressed in writing his "vigorous dissent" to hiring Petitioner based on her "preexisiting obligations." It is undisputed that his reference to preexisting obligations was a reference to Petitioner's children. (Dist. Ct. Op I; App. C, p. 53a). This statement is also reflective of the attitude that the Petitioner was worth less because of her role in society as

a wife and mother.[9] It was the stated intent of Congress, as quoted above, to address these types of employer attitudes in enacting the Equal Pay Act.

B. Congress' Intent With Respect to Bona Fide Job Evaluation Programs.

This Court has delved into the specific Congressional intent expressed during the debates on the fourth affirmative defense to the Equal Pay Act. Initially Congress only contemplated two affirmative defenses, namely merit and seniority programs. The four affirmative defense, bona fide factors other than sex, was added because of a concern that employers' time honored methods of job evaluation as a basis for compensation should not be undermined. As stated by this Court:

> "Job evaluation is an accepted and tested method of attaining equity in the wage relationship."
>
> * * *
>
> "(A) bona fide job classification program that does not discriminate on the basis of sex will still serve as a valid defense . . . ." (Corning v. Brennan, supra, 417 U.S. at 200).

The concept expressed by Congress is that employers know the type of factors that they value on the job and that should affect compensation for the good of the organization.

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[9] The efforts of the lower courts to dismiss these comments as concerns about the number of hours Petitioner could work are unconvincing since Mastrangel's written statement referenced a projected number of billable hours for Petitioner that were no lower than the billable hours of the average male attorney at the firm.

Ironically, that is exactly why the subject case is the quintessential Equal Pay Case. This firm had made a written determination as to the types of factors that they would value on the job and that would affect compensation. These factors were stated in their Business Plan document, along with a bona fide mathematical compensation formula that would govern the firm. (Respondents' Overview of Fiscal System, App F., pp. 74a-75a). Petitioner seeks only that Respondents honor their own established program.

It is certainly not consistent with the intent of Congress to allow an employer to seek to disavow their own bona fide job classification system, when the system itself would have resulted in equal pay for women had it been honored. That was the basis for this Court's decision in Corning Glass Works v. Brennan, supra. The defense asserted there failed as a matter of law because, among other things, the employer's own classification system rated the day and night supervisory jobs as equivalent, and the employer sought to disavow that classification in its defense under the Equal Pay Act. This Court concluded that such an effort could not establish the fourth EPA affirmative defense of a "factor other than sex" as a matter of law, ruling as follows:

> It is not the (Plaintiff) that is trying to look behind Corning's bona fide job evaluation system. . . . Rather, it is Corning that asks (the Court) to differentiate between jobs which the company itself has always equated. (Corning v. Brennan, supra, 417 U.S. at 203).

The same conclusion should be reached here in order to be consistent with the intent of Congress and the prior decision of this Court. The Respondents should not be able to meet their burden of proving the fourth affirmative defense, a

"factor other than sex," as a matter of law, because the reasons asserted for reduced compensation that are claimed to be "factors other than sex" deviate from the compensation/evaluation system that the Respondents have always relied on to determine the appropriate amount of compensation.

C. Congressional Intent in Applying the Equal Pay Act to Professionals.

The Fair Labor Standards Act, of which the EPA is a part, is not always applicable to professionals and managers. Congress, however, expressed its intent to have the Equal Pay Act portion of that statute applicable to professionals and managers. (29 U.S.C. § 213).

Given the number of years that the Equal Pay Act and other discrimination statutes have been in effect, there should, hopefully, be few jobs where entry level wages are blatantly discriminatory based on gender. Unfortunately, the same thing cannot be said of professionals or managers with many years of experience. This differential is called 'the glass ceiling' by many writers, and at some establishments it is rock solid.

The legal community is not immune from the "glass ceiling" effect. Statistical studies commissioned by Michigan's mandatory Bar Association disclose almost perfect gender equity in starting salaries for new graduates from law school (at least at the larger firms). The same is true of salaries for Judges and for those in the public sector. In the private sector, however, the "gender gap" is substantial after just a few years post graduation and it grows larger over time, even though the study is designed so that only full time practitioners are included.

The point here is not that this case should be taken up because it involves a law firm. Rather, the case should not be permitted to be avoided or dismissed simply because it involves a law firm. That would completely undercut the intention of Congress that the EPA must be applicable to professionals.[10]

In fact, if the Courts cannot enforce the Equal Pay Act in a case where the Employer maintains a mathematical payment formula, but denies it to the first female that is about to become highly compensated under it, then it would seem that the EPA could never be enforced with respect to professionals.

IV. THE MAJORITY DECISION OF THE SIXTH CIRCUIT IS ERRONEOUS.

A. Affirmative Defense For Substandard Compensation After The First Year.

In this case the substandard compensation formula offered to Petitioner was described by Respondents' own documents as being for the "first 12 months of employment." (Respondents' Minutes of 04/13/94; App. G, p. 79a). Consequently, Respondents needed an additional affirmative defense to try to justify the continuation of the substandard formula after Petitioner's first year. This was somewhat problematic because the Petitioner was one of their higher producers under the mathematical formula used for

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[10] Respondents began as a law firm of 18 men and no women in 1990. Two women were added in 1992 as part of a "package deal" when Respondents merged in a small firm containing their (now President) John Geriak. Respondents have hired 14 male attorneys and no female attorneys since Petitioner was constructively discharged by their firm.

compensation criteria, most of her clients were of her own origination, there were several written documents praising Petitioner's legal work and no negative documentation.

Under these circumstances Respondents used the creative argument that Petitioner's substandard compensation the second year was based almost solely on the statements of the two female attorneys in the firm regarding a potential conflict of interest situation. Respondents argument was that "dissatisfaction with Plaintiff's conduct was the reason Plaintiff did not receive the formula after May of 1995." (Respondents' Brief on Appeal, p. 24). The nature of the alleged complaints made by the female attorneys was somewhat elusive. Respondents refused to specify any complaint about Petitioner's Job Performance in Answers to Interrogatories. Before the lower courts, Respondents argued the female lawyers were upset about the potential of a conflict of interest developing on an insurance coverage issue between a long term corporate client of Petitioner and a large business insurance carrier for which Respondents sometimes did employment work. It was undisputed the Petitioner raised the issue that there was potential for a conflict to develop and asked that Respondents request a waiver from the insurance carrier, just as they had on a prior conflict at the time Petitioner joined the firm. It is also undisputed that Respondents obtained the waiver on the first day that they requested it and that the insurance carrier never ended up denying coverage on the claim by Petitioner's client anyway.[11]

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[11] The alleged issue regarding a potential conflict of interest has a number of credibility problems. Even the District Judge referenced the development of such conflicts as "routine" when the firm represents a large insurance carrier. (Dist. Ct. Op. I; App. C, p. 44a). Respondents attempted to allege concern about a letter Petitioner sent to the insurance carrier. However, the letter was sent at the behest of an attorney hired by

Respondents claimed that although the female attorneys did not complain to any other attorneys at the time the potential conflict arose, some six months later, when Petitioner's substandard compensation formula was about to conclude, the female attorneys made statements opposing shareholder status for Petitioner at a 05/22/95 meeting based on the potential conflict of interest situation. Respondents alleged that one male attorney, Reed Cone, who had no personal knowledge of the situation and had never worked with the Petitioner, (but who allegedly held two proxies at that meeting), deferred to their judgment.

The Majority Opinion accepted this as a valid affirmative defense as a matter of law ruling that Petitioner could not prove that the female attorneys did not "honestly oppose" her. (Maj. Op.; App. A, p. 18a). Even if it were proper to require direct evidence of the Equal Pay Defendants' state of mind, however, (which it is not under Reeves v. Sanderson), the issue that the Court failed to properly address was whether any statements that might have been made by the female attorneys at that meeting were the reason the Board voted to continue Petitioner's grossly unequal rate of pay and, if so, whether that constituted a valid affirmative defense under the Equal Pay Act as a matter of law.

B. The Inference of Discrimination May Be Drawn From the Falsity of Respondent's Reasons.

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the insurance carrier to represent Petitioner's client and it was to advise the carrier about a fire that occurred at an Environmental Superfund Site. The letter was never introduced on the Record by Respondents. The insurance carrier involved had hired Petitioner to represent its insured on environmental matters both before and after the potential conflict of interest issue.

In Reeves, this Court confirmed that a finding of discrimination may be based on a Defendant's assertion of a false "nondiscriminatory reason."

> [It] is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation. * * * In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the fact finder is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt." Reeves v. Sanderson, supra 530 U.S. at 147-148.

Contrary to Reeves, however, the Majority Opinion refused to consider the circumstantial and direct evidence of the false positions taken by Respondents here, or the inferences to be drawn therefrom. The falsity of the position taken by Respondents is striking here:

1. The Majority's Opinion's Pivotal Findings Regarding Respondents Asserted Nondiscriminatory Reasons Are Contrary to Respondents Own Business Records. The majority opinion concluded that negative comments allegedly made by female attorneys at a May 22, 1995 Board meeting resulted in Petitioner losing support for shareholder status and, therefore, a decision was made to extend her substandard compensation package. The Majority Opinion found the following facts:

> At the regular board meeting held May 22,

> 1995, Lanyon and Vondale spoke in opposition to Plaintiff being made a shareholder. The firm's Bylaws required a super-majority of 75 percent for either the addition of a shareholder, or the hiring or termination of an attorney. In the discussion, it became apparent that there were enough "nays" to defeat a vote to make Kahn a shareholder. Rather than hold the vote on her shareholder status, the Board voted to extend Plaintiff's contract under the same terms and conditions for another year. (Maj. Op.; App. A, pp. 6a-7a).

These findings are totally contrary to the Respondents' own detailed meeting Minutes which make no references to any criticisms, but state only that the Professional Personnel Committee was not able to attend the Board meeting and had, therefore, met and decided in advance of the Board meeting to recommend against "partnership track" and, instead, retain Petitioner on her reduced salary. Respondent's Minutes of the May 22, 1995 Board meeting state as follows:

> In the absence of William Coon, Chairman Dean advised the members that Nancy Kahn's employment contract with Dean & Fulkerson was due to expire. The Professional Personnel Committee had, therefore, met and after review and consideration of all the factors involved formulated their recommendation that the Firm extend Nancy Kahn's employment contract for another year on the same terms, rather than placing Ms. Kahn on the partnership track at this time. (App. H, pp. 81a-84a).

2. **The Alleged Comments on Which the Defense Was Based Related to Shareholder Issues and Not Compensation Issues.** The alleged comments by the female attorneys and the Affidavit of Read Cone submitted by Respondents related only to shareholder status and not to compensation. There is nothing in this record suggesting that any of them disagreed with providing Petitioner with an equal compensation formula.

3. **While a Partnership Vote Required a Super-majority, a Vote to Provide Equal Pay Did Not, So There Is Nothing on the Record Justify the Refusal to Provide Equal Pay.** Respondents' claimed that, at the 05/22/95 meeting, the two female attorneys and one other (male) shareholder "would have" voted against making Petitioner a shareholder and that the male shareholder held two proxies. (Affidavit of Read Cone, Court of Appeals J.A., Vol I., p. 235).

Even assuming, for the sake of argument, that the shareholder issue had been properly placed before the Directors for discussion and that super-majority support to make Petitioner a shareholder did not exist, that is a completely separate issue from Equal Pay, since this firm paid male non-shareholders by the standardized formula.

The Majority Opinion disregarded all precedent under the Equal Pay Act by eliminating Equal Pay as an option for the Board. As the Dissent points out, there was no super-majority requirement to provide Petitioner with Equal Pay. (Dissent, p. 23; App. A, p. 28a). Accordingly, the three alleged votes and two alleged proxies asserted by Respondents, even if they had opposed shareholder status for Petitioner, were completely insufficient in number to defeat

a vote on Equal Pay.[12]

4. Respondents' Claim That They "Were Prepared" to Offer Petitioner Full Compensation Is Contrary to Defendants' Documents. This claim is contrary to Petitioner's testimony and to all of the Respondents' contemporaneous meeting minutes and memos, which show that the compensation formula was explained to Petitioner initially, but the Professional Personnel Committee only recommended to the Board and obtained approval for the reduced compensation formula on which the firm projected its profits in writing. This is circumstantial evidence of falsity under the Reeves test.

5. The Respondents Did Not Reference the Asserted Defense in Answers to Interrogatories Which Asked for Specific Information Regarding Any Complaints in Petitioner's Job Performance. Petitioner respectfully takes the position that when an Equal Pay defendant refuses to articulate or even reference their factual defense to an Equal Pay claim in Answers to Interrogatories, they should be concluded to have failed, as a matter of law, to come forward

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[12] Maj. Op., pp. 14-15; App. A, p. 17a states that if a shareholder vote was unsuccessful then Petitioner's employment would have been terminated if the contract had not been extended. Similarly at p. 18a, the Majority concludes that because of criticism of two female employees, "Plaintiff faced unemployment as well as rejection as a shareholder." This conclusion is particularly curious since none of the Respondents have ever claimed or argued that they considered terminating Petitioner at this point. Even the alleged (but undocumented) critic Janet Lanyon testified that she did not want Plaintiff to leave. Indeed, the Majority Opinion itself specified that it would take a 75% super majority to terminate an attorney (App. A, pp. 6a-7a), and even Respondents claimed that there were only three attorneys who had reservations about making her a shareholder (out of 24).

with evidence to create a material issue with respect to their defense. Moreover, a jury could certainly conclude that Respondents refusal to specify any complaints about Petitioner's job performance in Answers to Interrogatories is an indicator of prevarication particularly where, as here, the stories offered by Respondents have changed throughout these proceedings, and are at odds with their own officials' minutes.

6. The Alleged Negative Comments about the Conflict of Interest Issue Were Never Documented Anywhere, Even in the Respondents' Very Detailed Meeting Minutes. However, Documentation of Respondents' Approval of Petitioner's Work Is Present Consistently. The Dissent in this case seriously questioned Respondents' credibility based on the absence of any documented complaints about Petitioners compared with Respondents written Memoranda praising Petitioner's legal work both before and after the 05/22/95 meeting where they refused to even vote on the issue of Equal Pay. (Dissent; App. A, pp. 26a-29a).

7. The Firm's Professional Personnel Committee Was Involved in the Potential Conflict of Interest Issue at the Time it Occurred and Expressed No Concerns or Complaints to Petitioner about the Handling of It. The majority opinion references a letter that Plaintiff sent to her clients' insurance carrier, which was also a client of Respondents. However, the letter was never introduced on any record, or acknowledged in Respondents' Answers to Interrogatories and the attorney responsible for resolving conflict issues at Respondent's firm admitted that he could not recall if he ever bothered to look at the letter. (J.A. Vol. II, p. 293-296). The failure of the Respondents to even introduce the claimed letter on the record or acknowledge it in Answers to Interrogatories precludes them from relying on it to meet their heavy burden of proof. If the Respondents' attorney in

charge of conflicts, Respondent William Coon, had any genuine concerns, a reasonable juror could (in fact would) conclude that he would at least looked at the letter and voiced those concerns to Petitioner at the time these occurrences took place, instead of allowing them to be used half a year later in an attempt to justify paying Plaintiff close to $100,000 less per year than similarly situated male employees.

D. Refusal of Court to Consider Discriminatory Statements.

Under Reeves, it was error for the majority opinion to refuse to consider Respondents' statements (a) about a married female attorney not needing the money earned from working because her husband was an attorney, and (b) the 'vigorous dissent' to Plaintiff's hire based in part on her 'prior commitments' (i.e., family). These comments were made at the time of hire by the people involved in the process and they strike at the heart of the Equal Pay Act's Congressional intent as recognized by the Supreme Court. (See p. 16-17 of Petition).

The Majority rejected these comments as evidence of discriminatory motive in exactly the same way as the Appellate Court did in the Reeves case, see Reeves, supra, 530 U.S. at 146, 152-153. This Court in Reeves concluded that this was error because the "Court of Appeals impermissibly substituted its judgment concerning the weight of the evidence, for the jury's." Id. The Michigan Supreme Court also precludes granting summary disposition in favor of the employer when there is evidence of discriminatory remarks. Debrow v. Century 21, ___ Mich. ___; ___ N.W. 2d ___ (2001 W.L. 41101 Mich. 2001).

E. Improper Credibility Determinations Made in the Majority Opinion.

The Majority Opinion made a credibility determination as to the Respondents, ruling that there was "no material issue with respect to Defendants' credibility." (Maj. Op.; App. A, p. 22a) This was contrary to this Court's ruling in Reeves.

This part of the majority opinion also disregarded the conclusion in Reeves that while uncontroverted evidence by a disinterested witness may be taken as established, the Court must disregard all evidence favorable to the moving party that the jury is not required to believe (i.e., self-serving testimony). (Reeves, supra, 530 U.S. at 151).

These examples are particularly pivotal here. When the Majority Opinion decided that the Respondents were credible and declined to take into consideration Respondents' conflicting business records, the testimony of Petitioner, and the circumstantial evidence and properly drawn inferences from Petitioner's prima facie case, it placed a burden on Petitioner that was impermissible and perhaps even impossible to meet.

The erroneous burden imposed, and the evidentiary restrictions contained in the Majority Opinion are contrary to this Court's Opinion in Reeves, contrary to the placement of the burden of proving EPA affirmative defenses on the Defendant, and contrary to the standards currently applied by many of the other circuits.

F. The Respondents' "Factors Other than Sex" Defense Fails as a Matter of Law Because it Is Not Consistent with the Respondents' Bona Fide Compensation Policies.

Perhaps the most egregious error of the Majority Opinion was its failure to recognize that regardless of what might have been said at certain meetings and who held what proxies, the fact remains that "conduct" of the type alleged had no impact whatsoever on the pay criteria for the male attorneys at the firm. Accordingly, none of those issues even qualify as meeting Respondents' heavy burden of proving an affirmative defense.

As this Court explained in Corning Glass Works v. Brennan, supra, the intent of Congress in adopting the fourth affirmative defense of "factors other than sex" was to defer to bona fide job performance and compensation criteria of the employer. However, in cases such as Corning, and here, where the Employer seeks to disregard its own established job performance and compensation criteria, and instead asks the Court to accept something inconsistent with its own established criteria, the Court will find that the asserted affirmative defense fails as a matter of law. (See discussion of the Corning holding in this regard at p. 17-19 of this Petition). That should have been the result in this case. Petitioner's Motion for Summary Disposition as to the Equal Pay Claim should have been granted, with the case remanded for the conclusion of discovery and trial on the issues of Equal Pay Act Damages and Damages under Michigan's Elliott Larsen Civil Rights Act.

RELIEF REQUESTED

While the grant of this Petition for Certiorari would provide the optimum guidance for the Circuits on this issue, this Court may conclude that its prior decisions offer enough guidance that a summary disposition on the merits, pursuant to this Court's Rule 16, citing the applicable principles and Supreme Court cases will be sufficient guidance.

/s/_____

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed November 13, 2000]

No. 99-1015

Nancy L. Kahn,
Plaintiff-Appellant,

v.

Dean & Fulkerson, P.C., et al.
Defendants-Appellees.

On Appeal from the United States District Court for the Eastern District of Michigan

Before: **GUY and MOORE, Circuit Judges; and DOWD, District Judge.***

*The Honorable David D. Dowd, Jr., United States District Court for the Northern District of Ohio, sitting by designation.

OPINION

RALPH B. GUY, JR., Circuit Judge. Plaintiff, Nancy L. Kahn, an attorney, appeals *pro se* from the district court's entry of judgment in favor of her former law firm, Dean & Fulkerson, P.C., and twenty individual shareholders.[1] The complaint alleged claims of wage discrimination under the Equal Pay Act, 29 U.S.C. § 206(d)(1); sex discrimination under the Elliott-Larsen Civil Rights Act, Mich. Comp. Laws Ann. § 37.2202; breach of contract and unjust enrichment; fraud and misrepresentation; conversion; civil conspiracy; and tortious interference with contract. These claims arise out of her employment with the firm and her allegation that she received less compensation because of her sex.

Plaintiff argues that the district court erred by denying her motion for partial summary judgment on the Equal Pay Act claim and granting defendants' motion for summary judgment. Plaintiff also asserts error in the district court's failure to decide pending discovery motions before granting

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[1]The individual defendants filed a separate motion for summary judgment, which was denied as moot. Although the individual defendants were named in the notice of appeal and remain parties to the appeal, neither plaintiff nor defendants raise any issues specific to claims against the individual defendants. The individual defendants are Larry Bolton; George Burnard; Read Cone, III; William Coon; James Dean; John Gierak; Paul Gilleran; Jerome Gropman; Clarence Hudson; Jeffery Hudson; Ian Hunter; Janet Lanyon; Larence Luke; Thomas Martin; Paul Mastrangel; Robert Mercado; Donald Pierce, Jr.; David Tennent; Richard Tennent; and Carol Vondale.

summary judgment to defendants. After review of the record and the arguments presented on appeal, we affirm.

I.

Nancy Kahn, an attorney specializing in environmental law, had practiced fourteen years and was a shareholder in the firm of Levin, Levin, Garvett & Dill when that firm decided to dissolve. Kahn wrote to Dean & Fulkerson about expanding its environmental law practice. Kahn indicated a willingness to consider a contract arrangement with some salary flexibility. In her first conversation with someone from the firm, Paul Mastrangel, who was a member of the professional personnel committee, told Kahn that the firm was not interested in adding an environmental attorney with less than $300,000 in annual billings. Despite this initial response, Kahn was later contacted by Bill Coon, who was chairman of the professional personnel committee.

On March 15, 1994, Kahn spent several hours interviewing with Coon and Janet Lanyon, another shareholder. During that meeting, Kahn learned that Dean & Fulkerson compensated its shareholders in accordance with a mathematical formula under which the attorney is responsible for his or her own expenses plus a pro-rata share of the firm's common expenses, and the fees generated by each attorney are divided 82 percent to the attorney providing the work and 18 percent to the attorney who originated the client. They discussed the fact that under this "standard" formula the financial risk fell upon the attorney rather than the firm. Coon's internal memorandum to the shareholders about the interview explained that:

> Ms. Kahn indicated that she controls approximately $100,000 in billings and has received commitments from two major environmental clients. While this level of billing does not make her self-sufficient, she is willing to take the economic risk inherent in the D&F system and seeks, at most, a 60-90 day deferral of expenses to the extent they are not covered by collections.
>
> . . . She has an opportunity to join a firm, but she is attracted to our system and would like to pursue the possibility of joining D&F as long as it won't take too long.

In correspondence dated March 29, 1994, Kahn informed Coon that she was the billing attorney for almost $70,000 during the previous year, but also expected to bring two other clients with large environmental projects with her. As a result, Kahn concluded: "I am guessing that this will add up to $100,000 in billing in the next year, but that is by no means assured." Coon estimated that the firm might be able to refer $45,000 to $60,000 in environmental work to Kahn in the first year. Plaintiff expressed concern about expenses and testified that she told Coon she was "willing to take the risk of not having any income or a diminished income, but . . . was not willing to run the risk of writing them checks every month to defray their expenses in the beginning." Kahn testified that she told Coon she had a specific level of risk she was willing to take and "did not want to be owing them money for or paying them money for expenses that they had anyway like overhead during the first few months."

In a telephone conversation on April 11, 1994, Coon proposed an alternative formula under which the firm would absorb all expenses for one year, and she would get 60 percent of the first $100,000 of fees she generated and 50 percent beyond that.[2] Plaintiff's handwritten notes taken during that conversation show that the differences between the alternative and standard formulas were discussed and the projected income for each was calculated for several levels of billings.[3] Although plaintiff's notes do not reference it, plaintiff testified that she was repeatedly assured by Coon that after the first year she would be placed on the standard formula and a vote would be taken on her becoming a shareholder of the firm. Plaintiff considered the proposal and decided that it would be acceptable for the first year. Plaintiff claims that she was never offered an initial period of deferred expenses, even though the firm had an informal practice of not collecting the expenses owed by a new attorney during the first few months of employment.

At the firm's board meeting on April 13, 1994, Coon presented the recommendation of the professional personnel committee that Kahn be retained on an "of counsel" basis for a period of six months to a year under the alternative formula. Mastrangel opposed the recommendation and provided a

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[2]Coon testified that he started at the firm under a similar alternative formula.

[3]In retrospect, it turned out that plaintiff had much higher billings than expected and would have earned significantly more under the standard formula. Plaintiff offered evidence that under the standard formula she would have earned nearly $28,000 more during the first year and over $96,000 more after that.

written memorandum with his reasons, including his concerns about the amount of billings plaintiff would bring and her preference for a "shared-risk" position. He closed the memo by asking that his "vigorous 'dissent'" to the recommendation be recorded. The shareholders nonetheless voted to make an offer of employment to Kahn and, if accepted, to hire her under the proposed alternative formula.

On May 6, 1994, plaintiff executed a written agreement for her employment with the firm under the alternative compensation formula. Plaintiff objected to a one-sided termination provision and it was deleted. The agreement provided that it would continue for a twelve-month period unless terminated earlier by the firm "at any time and for any reason," by Kahn upon 30 days notice, or if Kahn were no longer a member in good standing of the State Bar of Michigan. The agreement also contained a merger and integration clause providing that: "This Agreement supersedes any prior agreement between the parties" and "constitutes the entire agreement of the parties."

In March 1995, plaintiff's continued employment was discussed by the shareholders since her contract was expiring soon. Two female shareholders, Janet Lanyon and Carol Vondale, expressed their displeasure with Kahn's handling of a conflict of interest waiver issue at the end of 1994. At the regular board meeting held May 22, 1995, Lanyon and Vondale spoke in opposition to plaintiff being made a shareholder.[4] The firm's by-laws required a super-majority of

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[4] Lanyon and Vondale joined the firm as shareholders and were compensated under the standard formula from the beginning.

75 percent for either the addition of a shareholder, or the hiring or termination of an attorney. In the discussion, it became apparent that there were enough "nays" to defeat a vote to make Kahn a shareholder. Rather than hold the vote on her shareholder status, the board voted to extend plaintiff's contract under the same terms and conditions for another year. Some shareholders testified that they did so to save plaintiff the embarrassment of being rejected as a shareholder or terminated from employment. Others said they hoped plaintiff would redeem herself and become a shareholder in the future. At that same meeting, the board also voted to advertise for an environmental attorney.[5] Kahn asked Coon if she could be compensated under the standard formula and whether she could address the board concerning the conflict of interest issue. Kahn was told she could do neither, and she continued to work under the terms of the original contract. A memorandum in August 1995 confirmed that her contract was continued for a second year.

In mid-1995, one of the firm's clients, Electro Wire, was in the process of being acquired by another company. Electro Wire, a longstanding client of firm member Larry Luke, paid the firm a one-time "bonus" of $300,000 in July 1995. Luke had the discretion to divide the money as he saw fit. Luke did not take any of the bonus himself, but distributed

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Another female attorney, Patricia Morrow, joined the firm as an associate shareholder and became a shareholder after plaintiff left.

[5]In September 1995, the firm hired James O'Brien, another environmental attorney, for a one-year term under the standard compensation formula. O'Brien became a shareholder at the end of his first year.

bonuses to some of the attorneys based upon their length of service with the firm, their work on behalf of the client, and the hours worked on the Electro Wire transaction. Plaintiff, who had worked on the environmental aspects of the deal, received $15,000. Plaintiff alleges that the bonus was unethically and improperly hidden in a client trust account and inequitably divided.

In December 1995, plaintiff advised several shareholders that she would be leaving the firm. At its December meeting, the board voted to adjust its budget for the next year to reflect Kahn's departure. Kahn resigned from the firm effective March 15, 1996. She became a non-equity shareholder at Foster, Swift, Collins & Smith, P.C., and did not lose any clients or business when she left Dean & Fulkerson.

In April 1997, plaintiff brought this action against Dean & Fulkerson and its shareholders. In June 1998, defendants filed motions for summary judgment on all of the claims, and plaintiff filed a motion for partial summary judgment. In an opinion and order dated August 5, 1998, the district court granted defendants' motion for summary judgment, denied plaintiff's motion for partial summary judgment, and denied the individual defendants' separate motion as moot. Plaintiff sought reconsideration, contesting the district court's conclusions and application of the law. The district court denied the motion after addressing plaintiff's specific claims of error. This timely appeal followed.

II.

We review the grant of summary judgment *de novo, see Smith v. Ameritech,* 129 F.3d 857, 863 (6th Cir. 1997), and the denial of summary judgment for an abuse of discretion, *see Hanover Ins. Co. v. American Eng'g Co.*, 33 F.3d 727, 730 (6th Cir. 1994). Summary judgment is appropriate when there are no issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(c). In deciding a motion for summary judgment, the court must view the factual evidence and draw all reasonable inferences in the light most favorable to the non-moving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). A genuine issue for trial exists when there is sufficient evidence upon which the jury could reasonably find for the nonmoving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

A. State Law Tort Claims

Plaintiff appeals the entry of summary judgment on her claims of breach of contract, unjust enrichment, fraudulent misrepresentation, and conspiracy. These claims rest upon plaintiff's testimony that Coon repeatedly assured her that after one year she would be compensated under the standard formula and a vote would be taken on whether to offer her a shareholder position. She also testified that Coon said the firm had no intention of maintaining attorneys on a contract basis and had not done so in the past. Plaintiff

specifically testified that these oral assurances were given *before* she executed the employment contract with the firm.[6]

1. Breach of Contract

The district court found that the defendants were entitled to judgment as a matter of law on the contract claim because the merger and integration clause superceded any prior agreements between the parties. The court concluded that: "The parol evidence rule precludes admission of extrinsic evidence to contradict the terms of a written contract that was intended by the parties to be a complete expression of their agreement." Arguing that a trier of fact would not believe that the parties did not discuss what would happen at the conclusion of the first year, plaintiff maintains that the agreement was only partially integrated. *See NAG Enters., Inc. v. All State Indus., Inc.*, 407 Mich. 407, 285 N.W.2d 770 (Mich. 1979).

The court in *NAG Enterprises* explained that as a prerequisite to the application of the parol evidence rule, "there must be a finding that the parties intended the written instrument to be a complete expression of their agreement as to the matters covered. Extrinsic evidence of prior or contemporaneous agreements or negotiations is admissible as it bears on this threshold question of whether the written instrument is such an 'integrated' agreement." *Id.* 285 N.W.2d at 771 (footnotes omitted). Where the written agreement contains an express integration and merger clause,

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[6]Coon denied giving the alleged assurances.

however, parol evidence is not admissible to show that the agreement was not integrated. *See UAW-GM Human Res. Ctr. v. KSL Recreation Corp.*, 228 Mich. App. 486, 579 N.W.2d 411 (Mich. App. 1998). "Thus *NAG*, which allows resort to parol evidence to resolve this 'threshold issue,' does not control when a contract includes a valid merger clause." *Id.* 579 N.W.2d at 416. The express merger and integration clause in this case precludes plaintiff from claiming that defendants breached their contract by failing to place her on the standard compensation formula or take a shareholder vote.[7]

2. Unjust Enrichment

Maintaining that she has properly alleged a claim for unjust enrichment under *Barber v. SMH (US), Inc.*, 202 Mich. App. 366, 509 N.W.2d 791 (Mich. App. 1993), plaintiff appeals from the grant of summary judgment to defendants. Plaintiff argues that she would not have brought clients to Dean & Fulkerson, except for the representation that she would be compensated under the standard formula after the first year. The court in *Barber* explained:

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[7]Plaintiff also misapprehends the district court's further holding that any such contract claim would be barred by the statute of frauds. While at-will employment contracts generally are capable of being performed in less than a year and are not subject to the statute of frauds, it is the alleged oral promises which were to be performed *after* the one-year written contract had expired that are void under the statute of frauds. *See* MICH. COMP. LAWS ANN. § 566.132(1)(a) (West 1996).

> The elements of a claim for unjust enrichment are: (1) receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendant. In such instances, the law operates to imply a contract in order to prevent unjust enrichment. However, a contract will be implied *only if* there is no express contract covering the same subject matter.

Id. 509 N.W.2d at 796 (citations omitted) (emphasis added). The district court properly found that no contract could be implied under the doctrine of unjust enrichment because there was an express written contract setting forth the parties' agreement regarding Kahn's compensation.[8]

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[8]Plaintiff also relies upon H. J. Tucker & Associates, Inc. v. Allied Chucker and Engineering Co., 234 Mich. App. 550, 595 N.W.2d 176 (Mich. App. 1999), lv. denied, 607 N.W.2d 722 (Mich. 2000), in which the court noted that it was possible for a plaintiff to recover for breach of contract during the period that a contract was in force and also under an implied contract theory for a period when there was no contract in force. In that case, a sales representative worked at a set commission under an oral contract from 1957 until 1986. Then a new general manager unilaterally modified the oral contract and reduced the plaintiff's commissions. The court's observation about alternative theories was made in connection with the review of the denial of the defendant's motion for summary judgment. In this case, Kahn entered a one-year written contract defining the agreed compensation formula, which defendants offered to extend for a second year. Although plaintiff wanted to be compensated under the standard formula after the first year, the evidence does not support a claim that there was no

Finally, although plaintiff asserts that a jury should be permitted to consider her fraudulent misrepresentation and civil conspiracy claims, she has not articulated any specific claims of error in this regard. Plaintiff has also failed to argue how the court erred with respect to the conversion and tortious interference with contract claims. Accordingly, we consider all of these claims to be abandoned on appeal. *See Enertech Elec. Inc. v. Mahoning County Comm'rs,* 85 F.3d 257, 259 (6th Cir. 1996).

B. Equal Pay Act

1. *Prima Facie* Case

To establish a *prima facie* case of discrimination under the Equal Pay Act (EPA), a plaintiff must show that "an employer pays different wages to employees of opposite sexes 'for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." *Corning Glass Works v. Brennan,* 417 U.S. 188, 195 (1974) (quoting 29 U.S.C. § 206(d)(1)). For the work of two employees to be "equal work" there need only be "substantial equality of skill, effort, responsibility, and working conditions." *See Odomes v. Nucare, Inc.,* 653 F.2d 246, 250 (6th Cir. 1981). That determination must be made from an overall comparison of the work, not its individual segments. *See Id.*

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contract in force after the end of the first year.

The district court found that, taking the evidence in the light most favorable to plaintiff, she could make a *prima facie* showing under the EPA that different wages were paid to her and O'Brien for substantially equal work. We agree. O'Brien, who was hired about a year and a half after Kahn, had practiced environmental law for more than ten years. He signed a one-year contract like plaintiff, but was compensated under the standard formula and became a shareholder at the end of the first year. O'Brien estimated, just as plaintiff did, that he would have approximately $100,000 in billings his first year.

Defendants contest this finding, arguing that Kahn and O'Brien were not "similarly situated" candidates for several reasons. The evidence shows that O'Brien, as a sole practitioner, had a "track record" of billings from his own clients and expressed confidence in his ability to generate sufficient billings to take the risks associated with the standard formula. Plaintiff, on the other hand, had never been self-sufficient or billed more than $70,000 in one year. Also, while the firm did not have any attorneys specializing in environmental work when Kahn was hired, a year later the firm was comfortable that there was enough environmental work to keep two attorneys busy. There is no question that there were differences between Kahn and O'Brien, which defendant claims affected the compensation formulas they each contracted to receive during the first year. These differences do not undermine the finding that they were engaged in work involving substantially equal skill, effort, responsibility, and working conditions. Instead, they are relevant to the asserted defenses.

2. Defenses

Once the plaintiff makes a *prima facie* showing, the defendant has the burden to prove that the wage differential is justified under one of the four exceptions: "(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex." 29 U.S.C. § 206(d)(1). The last of these defenses, which is at issue here, "does not include literally *any* other factor, but a factor that, at a minimum, was adopted for a legitimate business reason." *EEOC v. J.C. Penney Co., Inc.*, 843 F.2d 249, 253 (6th Cir. 1988) (citing *Bence v. Detroit Health Corp.*, 712 F.2d 1024, 1029-31 (6th Cir. 1983)). *See also Dey v. Colt Constr. & Dev. Co.*, 28 F.3d 1446, 1462 (7th Cir. 1994) (factor need not be related to the requirements of a position, or business related, as long as it is *bona fide* and not applied discriminatorily).

Unlike the burden-shifting framework applicable to other discrimination claims, the defendant bears the burden of proving one of these defenses and "is not entitled to summary judgment unless it has satisfied its burden of demonstrating that there is no genuine dispute on any material fact in regard to this issue." *EEOC v. Romeo Cmty. Schs.*, 976 F.2d 985, 989 (6th Cir. 1992). Thus, it is not the plaintiff who must produce evidence from which a reasonable juror could find that the employer's reason is pretextual, but, rather, the employer who must establish the defense so clearly that no reasonable juror could find to the contrary. *See Buntin v. Breathitt County Bd. of Educ.*, 134 F.3d 796, 799-800 (6th Cir. 1998).

The district court granted summary judgment to defendants finding that the pay differential between Kahn and O'Brien was based upon factors other than sex, and that plaintiff's portion of the Electro Wire bonus was not determined by her sex. Plaintiff takes exception to the district court's findings, arguing that they are contrary to the evidence.[9]

Plaintiff relies upon the evidence that defendants had an informal practice of deferring the collection of expenses for a few months until there were receipts to cover them and that O'Brien's obligation to pay expenses was deferred for a period of time. Plaintiff argues that this was all she really wanted. To the contrary, plaintiff's own testimony indicated that she did not want to be obligated to pay the firm's expenses during a start-up period. The alternative formula proposed a *waiver* of all expenses for the first year and a division of fees to compensate the firm for taking that risk.

Despite plaintiff's claim that she was never offered the standard formula, the evidence shows that the firm's standard formula was explained to plaintiff and that Coon was prepared to recommend hiring her under the standard formula. The alternative formula was only proposed after Kahn expressed concern about having to pay expenses. Further, it is clear that

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[9] Plaintiff also argues, as she did in her motion for reconsideration, that the district court improperly applied the burden-shifting framework to the Equal Pay Act claims. The district court articulated the correct EPA standard, but also stated that defendants had "articulated" a reason based upon something other than sex. Given our *de novo* review of the grant of summary judgment, any error in this regard would be immaterial.

the alternative was proposed as just that, with the differences outlined and potential income calculated. Plaintiff denies she negotiated the contract since it included "benefits" she did not need or want. The fact is that she not only accepted the alternative formula before the contract was drafted, but also had the written agreement modified. We find that defendants met their burden of demonstrating that no genuine issue of material fact existed on whether plaintiff's compensation during the first year was based upon factors other than sex.

With respect to the failure to change the compensation formula at the end of the first year, there are two components to plaintiff's claim: the failure to take a shareholder vote (which would necessarily include the standard compensation formula); and the one-year extension of the contract under the alternative formula. The evidence shows that at the end of the contract term, two female shareholders spoke against plaintiff's participation in the firm as a shareholder and garnered enough support to defeat a shareholder vote. As such, plaintiff's employment would have terminated with the expiration of the contract if it had not been extended.

Plaintiff argues that the conflict of interest waiver issue was pretextual and, as a result, defendants did not prove that the pay differential during the second year was based upon factors other than sex. When Kahn started at the firm, Lanyon had to secure a conflict of interest waiver from Amerisure, a client of both Lanyon and Vondale, because Kahn was representing a client in a suit against Amerisure. Amerisure's corporate counsel told Lanyon not to let it happen again. In late 1994, Kahn asked Lanyon to obtain another conflict of interest waiver from Amerisure with respect to an environmental matter on which Kahn was

working. Before a waiver was obtained, Kahn sent a letter to Amerisure on behalf of her client. Coon testified that he felt Kahn had caused the firm to be in breach of the code of conduct by sending an adversarial letter to an existing client without first getting conflict of interest waivers. Kahn and Lanyon were both required to obtain waivers from their clients. Lanyon testified that Kahn failed to acknowledge the conflicts procedure, while Kahn claimed that it was Lanyon who delayed resolution of the matter.

Plaintiff contends there is a question of fact whether this explanation was pretextual because several shareholders advised her that the "articulated reason was invalid." To support this claim, plaintiff states by way of affidavit that two shareholders described conflict of interest waivers to be "routine" or "nothing"; several others were unaware of the substance of the defense; and Coon indicated he would ask Lanyon to get a waiver in a similar situation. Plaintiff also emphasizes that nothing was documented at the time and that Lanyon and Vondale had never "worked a file with her." The record, however, contains no evidence to suggest that Lanyon and Vondale did not honestly oppose plaintiff becoming a shareholder because of her handling of the waiver issue, or that their vocal opposition did not motivate others to vote with them. It was because of their vocal opposition that plaintiff faced unemployment as well as rejection as a shareholder.[10]

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[10]Plaintiff's reliance upon *Tinker v. Sears, Roebuck & Co.*, 127 F.3d 519, 523 (6th Cir. 1997) is misplaced. In *Tinker*, the plaintiff claimed his employment was terminated because of his age. The court reversed summary judgment for the defendants, finding a question of fact whether the articulated reasons were pretext for age discrimination. Specifically, there were inconsistencies in the

Finally, plaintiff argues that a question of fact exists on the defense by virtue of two allegedly discriminatory statements. Specifically, plaintiff testified that Coon told her Vondale did not need the money she earned from working because her husband was an attorney. This statement, however, is not the equivalent of a declaration that women should not be paid as much as men. Further, Coon presented plaintiff with the standard formula and recommended that she be hired. The other statement was Mastrangel's objection to hiring plaintiff because she projected she would bill only 1500 hours due to "preexisting obligations"; namely, her family. These comments could not lead a rational trier of fact to conclude that the alternative formula was first offered to plaintiff and then extended for a second year because of her sex. We agree with the district court that the defendants met their burden of showing that the pay differential in the compensation formula was based upon factors other than sex.

Lastly, plaintiff does not contest the district court's conclusion with respect to the distribution of the Electro Wire bonus. The evidence showed that she received a greater portion of the bonus than two male attorneys who billed more hours than she had on the transaction and four male attorneys who worked for the client for several more years than she had. Plaintiff also testified that Luke assigned her work on substantial clients, supported her becoming a shareholder, and asked her not to leave when she resigned. We agree that there

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testimony of defendants' witnesses about who made the decision and what the reason was for his termination. There was also evidence that a younger employee was not terminated for similar conduct.

was no evidence that she received a lesser distribution based upon her sex.[11]

Having found that the district court did not err in granting summary judgment to defendants on the EPA claim, we also conclude that it was not an abuse of discretion to deny plaintiff's motion for partial summary judgment.

C. Sex Discrimination

Plaintiff seeks to prove disparate treatment using circumstantial evidence under the applicable burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See Clarke v. K-Mart Corp.*, 197 Mich. App. 541, 495 N.W.2d 820, 822 (Mich.App.1992). The district court presumed that Kahn could establish a *prima facie* case of sex discrimination, and the parties do not contest that finding on appeal. There is also no question that the defendants articulated legitimate non-discriminatory reasons for the wage differential between plaintiff and O'Brien.

On summary judgment, the plaintiff bears the burden to come forward with evidence to create a genuine issue of material fact whether the defendants' articulated reasons were pretext for sex discrimination. *See Reeves v. Sanderson*

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[11]On appeal, plaintiff relies upon the equitable principle that a court may consider one party's fraudulent concealment of marital assets in reaching an equitable property division in a divorce proceeding to conclude that she was entitled to a greater share of the bonus. *See Sands v. Sands*, 442 Mich. 30, 497 N.W.2d 493 (Mich. 1993). This principle does not state a cause of action against the defendants.

Plumbing Prods., Inc., 147 L. Ed. 2d 105, 120 S. Ct. 2097 (June 12, 2000); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993); *Kline v. TVA*, 128 F.3d 337 (6th Cir. 1997); *Lytle v. Malady, (on rehearing)*, 458 Mich. 153, 579 N.W.2d 906, 914-15 (Mich. 1998). A plaintiff can produce sufficient evidence to create a jury-submissible case on the credibility of an employer's explanations and a question of fact on the issue of pretext by showing that (1) the proffered reason had no basis in fact; (2) the reasons did not actually motivate the adverse action; or (3) the reasons were insufficient to motivate the adverse action. *See Kline*, 128 F.3d at 356-57 (quoting *Manzer v. Diamond Shamrock Chems. Co.*, 29 F.3d 1078, 1084 (6th Cir. 1994)).

When an Equal Pay Act claim and a sex discrimination claim arise out of the same set of underlying facts and allegations of wage discrimination, the standards of liability are sufficiently similar that their disposition should be the same. *See Buntin*, 134 F.3d at 801 (where there is a genuine issue of fact concerning wage differential under the EPA, there is an issue of fact on the parallel Title VII claim); *Korte v. Diemer*, 909 F.2d 954, 957 (6th Cir. 1990) (jury verdict on EPA claim required finding for plaintiff on Title VII claim). In this case, plaintiff's Equal Pay Act and sex discrimination claims arise out of the same facts and rest upon the same claim of unequal pay.

We have already concluded that defendants met their heavy burden of proving there was no genuine issue of material fact whether the pay differentials initially and after the end of the first year were based on factors other than sex. To the extent that the failure to make plaintiff a shareholder can be separated from the wage claims, plaintiff argues that

there is a question of fact whether the conflict of interest waiver issue was pretext for sex discrimination. Viewing the evidence in the light most favorable to plaintiff, there was no genuine issue of material fact on the credibility of defendants' explanation for the decision not to take a vote on her shareholder status. Accordingly, summary judgment was properly entered on the sex discrimination claim.

D. Discovery Motions

Plaintiff complains that a protective order entered in this case improperly permitted defendants to mark documents as confidential and require their return at the conclusion of this case. While plaintiff argues that requiring the return of certain personnel documents violates Michigan's Employee Right to Know Act, Mich. Comp. Laws Ann. § 423.501, we do not address this argument because it is irrelevant to the resolution of this appeal. Despite plaintiff's assertion that use of the documents was impeded because they were marked as confidential, the record indicates that the documents were considered by the district court.

Next, plaintiff charges that the defendants refused to provide legitimate discovery, which the district court permitted by failing to rule on several discovery motions. Plaintiff argues that she was forced to respond to the defendants' motions without the benefit of complete discovery. Yet, plaintiff did not oppose summary judgment on these grounds or submit an affidavit under Fed. R. Civ. P. 56(f). In her motion for reconsideration, plaintiff asserted that summary judgment should not have been granted before the discovery motions were decided. Even then, plaintiff did not

specify what discovery was needed or its potential relevance to the issues considered in granting summary judgment.

Although the general rule is that summary judgment is improper if the non-movant has not had an adequate opportunity for discovery, the non-movant is obliged to inform the district court of the need for discovery. *See Plott v. Gen. Motors Corp.*, 71 F.3d 1190, 1195 (6th Cir. 1995). We have required that a party opposing the motion file an affidavit under Rule 56(f) demonstrating how postponement of a ruling on the motion will enable him to rebut the showing of an absence of a genuine issue of material fact. *See Good v. Ohio Edison Co.*, 149 F.3d 413, 422 (6th Cir. 1998); *Klepper v. First Am. Bank*, 916 F.2d 337, 343 (6th Cir. 1990). Since Kahn filed a motion to compel discovery at the same time the defendants filed their motions for summary judgment, we review for abuse of discretion the district court's entry of summary judgment without deciding the discovery motion. *See Ironside v. Simi Valley Hosp.*, 188 F.3d 350, 354 (6th Cir. 1999); *Lewis v. ACB Bus. Servs., Inc.*, 135 F.3d 389, 409 (6th Cir.1998).

Plaintiff makes only conclusory statements about the district court's failure to rule on her discovery motions, but does not suggest how the requested discovery would have had a bearing on the decision to grant summary judgment. After review of the record, including plaintiff's motion to compel discovery, we are satisfied that the district court did not abuse its discretion in this case. Even if there was error in this regard, it was harmless. *See Good,* 149 F.3d at 422.

KAREN NELSON MOORE, Circuit Judge, dissenting. I dissent from the majority's opinion concerning

Kahn's Equal Pay Act (EPA) claim under 29 U.S.C. §206(d)(1) and her sex discrimination claim under Michigan's Elliott-Larsen Civil Rights Act, Mich. Comp. Laws Ann. §37.2202.

A. Equal Pay Act Claim

To establish a prima facie case under the Equal Pay Act, a plaintiff must demonstrate that an employer pays employees of opposite sexes different wages "'for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.'" *Buntin v. Breathitt County Bd. of Educ.*, 134 F.3d 796, 799 (6th Cir. 1998) (quoting *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974) (quoting 29 U.S.C. § 206(d)(1))). Jobs need not be identical to be "equal work." Rather, there must be "'substantial equality of skill, effort, responsibility and working conditions.'" *Id.* (quoting *Odomes v. Nucare, Inc.*, 653 F.2d 246, 250 (6th Cir. 1981)).

After the plaintiff establishes a prima facie claim under the EPA, "the defendant must 'prove' that the wage differential is justified under one of the four affirmative defenses set forth under § 206(d)(1) of the Equal Pay Act: (1) a seniority system; (2) a merit system; (3) a system which measures earnings by quantity or quality of production; or (4) any other factor other than sex." *Buntin*, 134 F.3d at 799 (citing *Corning Glass Works*, 417 U.S. at 196). "In an EPA case, the defendant *always* bears the burden of proving that its proffered reason is the true basis for the pay differential. The EPA plaintiff bears the burden of *producing* evidence of pretext solely where a reasonable jury viewing the defendant's

evidence could find only for the defendant; the plaintiff, however, never bears the burden of *persuasion* regarding the affirmative defenses." *Id.* 134 F.3d at 800 n.7.

The Equal Pay Act imposes a heavy burden on the defendant to justify the pay differential by proving one of the four specific affirmative defenses. An EPA defendant must prove its "defense so clearly that no rational jury could have found to the contrary," and only when the defendant satisfies this heavy burden of proof is the plaintiff required to present evidence of pretext. *Buntin,* 134 F.3d at 800 (quotation omitted). In this case, the district court and the majority of this court properly conclude that the plaintiff made a prima facie showing under the EPA. The district court and this court's majority, however, both fail to impose the proper burden of persuasion on Dean & Fulkerson for its affirmative defenses. By imposing in effect the lesser burden of production on Dean & Fulkerson, the majority misapplies our circuit's precedent in *Buntin,* which requires an employer like Dean & Fulkerson in an EPA case to bear the burden of persuasion regarding an affirmative defense for the wage differential between Kahn and O'Brien, her male counterpart.

Kahn has demonstrated that there is a genuine issue of material fact precluding summary judgment in favor of Dean & Fulkerson. Specifically, the key areas in which Kahn has raised a genuine issue of material fact involve Dean & Fulkerson's refusal to vote formally to extend Kahn shareholder status and their failure to place Kahn on the traditional salary formula at the end of her one-year contract. Kahn entered into an employment agreement with Dean & Fulkerson which provided for an alternate compensation formula to the standard scheme generally offered to attorneys

joining the firm, with the understanding that she would be considered for full shareholder status by the firm and placed on the traditional formula after this "developmental year." Kahn's alternate compensation formula provided for a 60/40 split between Kahn and the firm, respectively, for the first $150,000 and a 50/50 split for fees allocated to Kahn in excess of $150,000. In contrast, under the firm's standard compensation scheme, O'Brien received 82% of fees to which he contributed and 18% of fees he originated.

Despite the fact that Kahn was billing at a rate which far exceeded her own expectations and which made Kahn one of the top billing attorneys at Dean & Fulkerson, when the end of Kahn's contract approached, the shareholders of Dean & Fulkerson during a May 22, 1995 meeting failed to take even a formal vote to extend shareholder status to Kahn. Not only did the shareholders fail to extend shareholder status to Kahn, but also Dean & Fulkerson never even voted to consider placing Kahn on the traditional compensation formula. The shareholders voted instead to extend Kahn's contract for another year, using the alternate compensation formula which resulted in greater profitability to Dean & Fulkerson than if Kahn had been moved to the standard formula. To illustrate the great financial incentive on Dean & Fulkerson to retain Kahn at her alternate compensation schedule, Kahn presented evidence showing significant salary losses to her in the amount of $27,970 for the period from May 6, 1994 to April 30, 1995, and $96,404 for April 30, 1995 to March 15, 1996, because Dean & Fulkerson did not place her on the same compensation scheme as O'Brien.

Dean & Fulkerson claims that it decided not to vote formally on Kahn's shareholder status because there were

enough "no" votes to defeat the matter, and that the only reason the firm voted to extend Kahn's contract was to save her the "embarrassment" of losing a formal vote for shareholder status which, under the firm's by-laws, required a super-majority vote of 75% to confer shareholder status. As noted earlier, however, given Kahn's successful billing performance, it was more profitable to Dean & Fulkerson to retain her on the alternative formula than it would have been to allow her to be compensated by the firm's standard formula.

In addition, shareholders Vondale and Lanyon were particularly vocal in their opposition to Kahn attaining shareholder status based upon Kahn's alleged improper handling of a conflict of interest waiver. Defendant Coon testified, however, that Kahn informed him of the conflict of interest and he instructed that waivers be sent to both clients. According to Kahn, no one at the firm complained to her directly about how she handled the conflict of interest waiver at the time this incident occurred. Kahn further notes that the conflict of interest waiver issue, which Dean & Fulkerson now relies on to prove its affirmative defense that their refusal to extend her shareholder status was based on a factor other than sex, was never even mentioned in Dean & Fulkerson's answers to interrogatories in which Dean & Fulkerson was asked to specify any complaints regarding Kahn's job performance. Furthermore, Defendant Vondale testified in her deposition that although the conflict of interest waiver matter arose in November or December of 1994, Vondale did not formally mention this incident to shareholders until four months later at a shareholder meeting held in March of 1995, during which the shareholders were also concurrently discussing the expiration of Kahn's employment contract.

Kahn was later informed of the complaint regarding the conflict of interest waiver six months after the incident took place.

With respect to Dean & Fulkerson's failure to consider placing Kahn on the traditional compensation formula, as Kahn points out, Dean & Fulkerson's by-laws do not impose a super-majority requirement for shareholders to consider compensation issues. Thus, any supposed lack of votes by Dean & Fulkerson shareholders could not be a valid reason for their failure to consider moving Kahn to the same pay formula as her male counterpart, O'Brien. Kahn has shown that Dean & Fulkerson not only failed to consider extending her shareholder status, they also failed even to consider transferring her to the traditional compensation formula. Dean & Fulkerson's shareholders did not neglect to take a formal vote, however, on whether to retain Kahn on her alternate compensation formula, which not surprisingly yielded more profits to Dean & Fulkerson than would transferring Kahn to the traditional formula.

Dean & Fulkerson further contends that their justification for renewing Kahn's contract based on its original terms was to allow Kahn time to "rehabilitate" herself in the eyes of the shareholders. Yet, as of May 9, 1995, less than two weeks prior to the shareholder meeting in which Dean & Fulkerson refused to vote to extend shareholder status or even transfer Kahn to the traditional compensation formula, Defendant Hudson sent Kahn a memorandum praising her legal work and stating, "Your services contributed to my comfort level and were much appreciated. Since I believe the value of your services exceed your normal rate, I have taken the liberty of [making] an upward adjustment, to which I

assume you will not object . . . As you might surmise from the tenor of this memo, the client was very pleased. His comment was 'A first class fee for first class services.' Thank you and the others for great team work." J.A. at 629 (Memorandum from Hudson to Kahn).

In addition, by March 5, 1996, nearly ten months following the May 22, 1995 shareholder meeting, Kahn was still receiving positive remarks for her legal services from Defendant Martin. Based on the facts presented by Kahn that show that she received compliments for her legal performance by the shareholders of Dean & Fulkerson, both before and after the May 22, 1995 shareholder meeting in which the shareholders allegedly decided that Kahn needed more time to "rehabilitate" herself, Kahn has at the very least, raised a genuine issue of material fact as to whether Dean & Fulkerson refused to consider Kahn for shareholder status and compensation under the traditional formula for reasons other than Kahn's sex.

The majority opinion also incorrectly states that the "plaintiff does not contest the district court's conclusion with respect to the distribution of the [$300,000] Electro Wire bonus," in which the district court found that Kahn did not receive a reduced share of the bonus because of her sex. [1]

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[1]Kahn argues that, "based on these undisputed facts, Plaintiff has at least raised a genuine issue of material fact with respect to her equitable share of the success fee and whether the Defendants discriminatory distribution of the success fee should be included in her damages for the Equal Pay and Discrimination claims." Appellant br. at 25. Thus, Kahn does dispute the district court's determination regarding her allocation of the Electro Wire

Kahn handled all the environmental aspects in a $400,000,000 asset divestiture for Electro Wire, in which the client was pleased with Kahn's legal work. Dean & Fulkerson alleges that Kahn received $15,000, but Kahn contends that the most that could have been credited to her was approximately $5800. Kahn alleges that she was excluded from meetings regarding the success fee and that her share was reduced in violation of the EPA. Kahn thus raises a genuine issue of material fact as to the apportionment of her share of the Electro Wire "success fee."

Even if the evidence presented by Dean & Fulkerson could have met their heavy burden of persuasion of an affirmative "defense so clearly that no rational jury could have found to the contrary," *Buntin,* 134 F.3d at 800 (quotation omitted), Kahn has produced sufficient evidence to show that Dean & Fulkerson's proffered reasons for the wage differential was pretext. Kahn has called into doubt the credibility of Dean & Fulkerson's reasons for failing to extend her shareholder status, for failing to provide her with compensation according to the standard formula, and for failing to give her a more equitable share of the Electro Wire bonus. Claims involving the Equal Pay Act are one of the few instances where an employer, like Dean & Fulkerson, carries the onus of a burden of persuasion on its affirmative defense. It is thus highly unusual to grant summary judgment to the party bearing the burden of persuasion, especially where, as in this case, the plaintiff has offered sufficient evidence to raise a genuine issue of material fact as to the legitimacy of the defendant's affirmative defense that the wage differential

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bonus.

was the result of factors other than the plaintiff's sex. Kahn has raised a genuine issue of material fact regarding Kahn's wage differential and thus, summary judgment for Dean & Fulkerson, the party with the burden of persuasion on its affirmative defense, was improper.

B. Elliott-Larsen Civil Rights Act Claim

Regarding Kahn's sex discrimination claim under Michigan's Elliott-Larsen Civil Rights Act, I agree with the majority's statement of the law concerning liability for a claim under the EPA and a sex discrimination claim which arise out of the same conduct and evidence. Thus, when there is a genuine issue of material fact raised in an EPA claim, there is also a genuine issue of material fact raised in the parallel sex discrimination claim. *Buntin,* 134 F.3d at 801.

Because the majority of this court and I disagree on the issue of whether summary judgment in favor of Dean & Fulkerson, the party with the burden of persuasion on its affirmative defense in the EPA claim was improper, I must also disagree with the majority's disposition concerning Kahn's sex discrimination claim. Therefore, I also would reverse summary judgment in favor of Dean & Fulkerson with respect to Kahn's claim of sex discrimination under the Elliott-Larsen Civil Rights Act.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Filed November 25, 1998]

Civil Action No. 97-CV-71559-DT

NANCY KAHN,
Plaintiff,

vs.

DEAN & FULKERSON, P.C., LARRY M. BOLTON, GEORGE BURNARD, READ A. CONE, III, WILLIAM G. COON, JAMES P. DEAN, JOHN L. GIERAK, PAUL R. GILLERAN, JEROME C. GROPMAN, CLARENCE L. HUDSON, JEFFREY L. HUDSON, IAN R. HUNTER, JANET E. LANYON, LAURENCE M. LUKE, THOMAS P. MARTIN, PAUL J. MASTRANGEL, ROBERT L. MERCADO, DONALD A. PIERCE, JR., DAVID L. TENNENT, RICHARD J. TENNENT, CAROL L. VONDALE,
Defendants.

OPINION AND ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION

I. INTRODUCTION

This matter is before the court on plaintiff's motion to reconsider the court's August 5, 1998 Opinion and Order Granting Defendant Dean and Fulkerson's Motion for Summary Judgment. Pursuant to E.D. Mich. LR 7.1(h)(2), the court directed defendant to file a response. For the reasons set forth below, the court will deny plaintiff's motion for reconsideration.

As set forth in the Opinion and Order, this is primarily an employment discrimination case where plaintiff alleges discrimination on the basis of sex. Plaintiff asserts that the court either misunderstood the evidence, or viewed it in a light most favorable to defendant, and that there remains a material question of fact. Pursuant to E.D. Mich. LR 7.1(h), the party bringing a motion for reconsideration "shall not only demonstrate a palpable defect by which the Court and the parties have been misled but also show a different disposition of the case must result from a correction thereof." While the court does not believe that plaintiff has pointed to a palpable defect by which the Court and the parties have been misled, it will nevertheless review the key issues raised by this motion.

Plaintiff submitted a new affidavit which endeavors to raise several factual issues, however it appears that plaintiff is merely using this affidavit to reargue her case. A motion to reconsider is not the proper venue for introducing factual and legal arguments that plaintiff had the opportunity to raise

when the parties filed cross motions for summary disposition. See Emmons v. McLoughin, 847 F.2d 351 (6th Cir. 1989); Brownlee v. Chrysler Motors Corp., No. 89-CV-72108-DT, 1991 WL 561451 (E.D. Mich.), March 29, 1991. As set forth below, the court will not consider any new facts presented in this affidavit that were available to plaintiff prior to the time the court issued its decision in this case.

II. DISCUSSION

A. Plaintiff's Equal Pay Claim - Year One

In its Opinion, the court dismissed plaintiff's claim that defendant violated the Equal Pay Act because there was no material question of fact with respect to whether the pay differential between plaintiff and her male comparative, James O'Brien, was based on sex.

The defendant law firm has a compensation system for shareholders where the attorney (1) pays his or her individual overhead and a portion of the shared overhead of the firm, (2) receives 82% of the fees on matters they have personally billed, and (3) receives 18% of the remaining fees billed by themselves or others on clients they have originated. Plaintiff was compensated with a formula that did not require any payment for individual or shared overhead. She received a salary based upon a 60/40 split of her billings up to $150,000, with the firm taking sixty percent, and a 50/50 split after that.

Defendant testified that it believed plaintiff did not want to be compensated according to the shareholder formula because she did not want to take the financial risk inherent in that system. The court found that plaintiff failed to provide

any evidence to refute defendant's claim that plaintiff was responsible for reaching the contractual arrangement that governed her wages during the first year of her employment with the firm. Following is a discussion of the court's reasoning for each of factors it considered on this question:

"1. Plaintiff's letter of inquiry suggested such an arrangement."

Plaintiff argues that she is not protesting the fact that she signed a one year contract when she was initially hired, as O'Brien did, but that her salary formula should have been the same as the that used for shareholders and O'Brien. However, plaintiff's letter of inquiry, which initiated her relationship with the defendant firm, specifically states that [i]n order to facilitate my relocation in this short time frame I am willing to consider an of counsel or contract arrangement with some salary flexibility dependent upon the amount of work generated by my clients and the amount of work your office has available."

Plaintiff argues that this letter of inquiry was written before she understood defendant's compensation scheme, and therefore should not be viewed as supporting defendant's claim that it believed she wanted to negotiate a contract, including the terms of her salary.

Defendant offered testimony to show that they informed plaintiff that she would be its first environmental lawyer. This meant the firm could not offer plaintiff any certainty with respect to the level of in-house referrals she would receive, and accordingly, the level of revenue she could expect. Combined with this testimony, the court

properly viewed plaintiff's letter as part of the unrefuted evidence that plaintiff wished to negotiate a less risky compensation system. At minimum, plaintiff's letter combined with the unrefuted evidence that she had never worked significantly as a solo practitioner, led defendant to believe she was interested in a less risky compensation package.

"2. *Plaintiff's deposition testimony confirms that she requested a modification of defendant's standard formula to defray her obligation to cover her expenses."*

Plaintiff does not refute this statement. Rather, she argues that it was routine for the firm to allow new shareholders and associates, including those on the shareholders' formula, the opportunity to delay payments on overhead until they began to receive a regular income stream. While plaintiff is correct, the court Was not misled as to this point. Rather, the court considered this as one element of evidence supporting defendant's contention that it believed plaintiff did not want the risk inherent in the shareholder formula.[1] Moreover, this was by no means the only evidence

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[1]Specifically, plaintiffs testified as follows:

> I said that I was willing to take the risk of not having any income or a diminished income but that **I was not willing to run the risk of writing them checks** every month to defray their expenses in the beginning.

Plaintiff's Deposition, p. 49. Plaintiff further testified that she "didn't want to have to deplete [her] bank account in order to

the court considered on this point, precisely because plaintiff offered the testimony of defendant's accountant to show that a deferral of expenses was available with the standard shareholder formula. However, this does not limit the probative value of the testimony as support for defendant's understanding that this particular attorney was concerned about being paid according to a formula where she would be responsible for all of her own and the firm's overhead and expenses regardless of the income she generated.

Plaintiff also argues that the salary formula she was offered could also "leave her without a paycheck." While this is certainly true, plaintiff expressed concern about paying money to defendants for overhead, not merely with waiting until her clients began to pay their bills to receive her own compensation.

"3. Plaintiff is a skilled attorney who negotiated her own employment contract."

Plaintiff argues that she did not negotiate her own contract, and that defendant offered her terms of employment on a take it or leave it basis. Yet, plaintiff admits that she met with defendants William Coon and Janet Lanyon to discuss the terms of her employment prior to accepting a position with the firm. On March 16, 1994, defendant Coon sent a memorandum to all shareholders summarizing this meeting and indicating that "she is willing to take the economic risk inherent in the D&F system and seeks, at most, a 60-90 day

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pay their expenses the first few months, yes, that's true." Id., p. 62.

deferral of expenses to the extent they are not covered by collections." Defendant's Brief in Support of Motion for Summary Judgment, Exh. 2. Plaintiff's deposition testimony reflects the same understanding of this meeting, which led the court to conclude that the firm initially explained and offered plaintiff the shareholder compensation formula.

Plaintiff argues that defendant Coon was merely informing her of the shareholder formula, and that he admitted this was his normal practice during initial meetings with prospective attorneys. However, when negotiations got more serious, plaintiff admits having doubts about her ability to manage the risk inherent in the firm's standard compensation formula. See Plaintiff's Deposition, pp. 49, 62. Further, in a memorandum dated April 6, 1994, defendant Mastrangel states that "the candidate articulated on March 24, 1994, a preference for a "shared risk" position in which the candidate would seek from Dean & Fulkerson a deferral of expenses and some sort of"safety net", e.g. a guaranteed minimum number of hours of work from D & F or contribution from D & F shareholders." Defendant's Brief in Support of Motion for Summary Judgment, Exh. 4, p.2. The firm states it could not guarantee a minimum number of hours because it had never had an environmental attorney on its staff.

On March 29, 1994, plaintiff authored a handwritten memorandum to William Coon summarizing her expected income, where she wrote "I am (guessing that this will add up to $100,000 in billings in the next year - but that is by no means assured." Defendant's Response to Plaintiff's Motion to Reconsider, Exh. 2, p.2. All of these statements indicated to the court that plaintiff had discussions with the firm about

her salary, and that *she,* not the firm, preferred compensation terms other than the standard shareholder formula.[2] Plaintiff has presented no evidence or argument that would lead the court to believe it was misguided in reaching this conclusion.[3]

> *"4. Plaintiff admits she was offered the firm's standard formula and she requested a modification of it. Plaintiff's Dep. pp. 48-49."*

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[2]For example, the court considered the deposition testimony of defendant Janet Lanyon, which reads as follows:

> I had a number of conversations with her regarding her contract where the terms of the contract were discussed. This issue was just not an issue of dispute.
>
> I made clear to her in those conversations that there was a question as to whether the board was even willing to put her on this 60/40 split, as opposed to accepting her on the formula. The board was not going to be comfortable with the concept that it was going to accept the risk, as opposed to having Nancy accept the risk, and Nancy never said to me, well, wait a minute, I want the formula, I'm willing to accept the formula.

[3]Plaintiff contends that the court erred in concluding that she negotiated the terms of her contract because it includes certain items, such as office furniture, that she had no use for. The court's reference on this point was solely to negotiating the terms of her salary, which is the subject of this lawsuit.

Plaintiff submitted a new affidavit with this motion emphasizing that she was never actually offered the shareholder compensation formula. Plaintiff's Motion to Reconsider, Exhibit B. Plaintiff argues that she accepted the modified compensation formula in order to achieve the shareholder's formula at the end of her one-year contract. Plaintiff argues that the mere fact that she accepted the terms of her contract cannot defeat her Equal Pay claim, or else employers could simply show that a plaintiff-employee accepted substandard wages and no one could ever succeed on a claim under the Equal Pay Act.

The court did not view the fact that plaintiff accepted employment with defendant under a non-shareholder compensation scheme as evidence that defendant did not pay her unequal wages based upon her sex. Certainly this would be illogical. Rather, the court viewed all of the evidence with respect to plaintiff's employment contract and salary and found no evidence to support her claim that decisions regarding her pay were based upon her sex.

"5. O'Brien was offered the standard formula and accepted it."

Plaintiff compares herself to O'Brien, and argues that he was offered the shareholder formula (in a one-year contract) because he is a man, while she was forced to accept a lower salary because she is a woman. Plaintiff also points to the fact that O'Brien was offered the shareholder formula even though he requested and was given the opportunity to defer his expense payments during the initial term of his contract. Plaintiff argues that the firm's procedures require a vote of the shareholders before the standard formula can be

offered to a new attorney and because no vote was taken in this case, she was never offered the formula. The unrefuted testimony shows that O'Brien wanted the standard formula, while plaintiff made statements to indicate she was unwilling to accept it, at least during her first year of employment with the firm. Further, defendant states that it requires a vote before hiring, not before offering a potential candidate the shareholder compensation formula.

In light of all of the above, the court concluded that plaintiff failed to present any evidence to show that the salary differential between her and O'Brien was based upon sex.

B. Equal Pay Act - Year Two

Plaintiff argues that the court failed to properly respond to its argument that defendant violated the Equal Pay Act when it failed to raise her compensation at the end of her first year of employment. The court found there was no material question of fact on this point because defendant presented uncontroverted testimony showing that plaintiff was not made a shareholder because of the concerns of two female shareholders. Plaintiff has not pointed to any way in which the court was misled as to the law or facts on this point or to any evidence showing that the decision was based upon plaintiff's sex and not other factors. Defendant has met its "heavy" burden of showing that any differential in plaintiff's pay and that of attorney O'Brien was based upon factors "other than sex." See Timmer v. Michigan Dept. of Commerce, 104 F. 3d 833 (6th Cir. 1997).

C. Are Defendant's Reasons Mere Pretext?

Plaintiff argues that the court improperly required plaintiff to produce direct evidence of discrimination in addition to evidence that defendant's asserted reasons for its actions were a pretext for unlawful sex discrimination. This, plaintiff argues is contrary to Title VII law as defined in the Sixth Circuit in Kline v. Tennessee Valley Authority, 128 F.3d 337 (6th Cir. 1997).

In Kine, the court reviewed a Title VII race discrimination case and determined that the district court erred in granting summary judgment to the employer where plaintiff presented evidence that the employer's reasons for taking the actions it did were mere pretext for discrimination. Plaintiff argues that the court committed the same error in this case by failing to evaluate plaintiff's Equal Pay Act claim, in a similar manner.

Plaintiff is confusing Title VII with the Equal Pay Act. Although both laws prohibit discrimination on the basis of sex, the Equal Pay Act has requirements that are clearly different from the burden shifting paradigm employed to analyze a Title VII case. The court found that plaintiff established a prima facie case under the Equal Pay Act, but that there was no material question of fact regarding whether the pay differential between plaintiff and O'Brien was based on factors other than sex.[4] There was simply no evidence,

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[4]With respect to plaintiff's Elliott-Larsen Civil Rights Act claim of sex discrimination, the court did not require direct evidence of discrimination - rather, it found the plaintiff failed to create a material question of fact with respect to defendant's

other than plaintiff's new affidavit, to support plaintiff's claim that defendant did not believe plaintiff preferred an alternative salary arrangement.

Plaintiff suggests that there is a fact question with respect to defendant's explanation for the pay differential because individual defendant William Coon stated that he would also ask the same female shareholder for a conflict waiver if such an issue arose with one of his clients. Further, another individual defendant opined that the conflict problem was"routine," and a third admitted that the issue was "nothing." Finally, plaintiff alleges that two individual defendants refused to meet with her to discuss the issue.

With full awareness of these issues, the court found that plaintiff presented no evidence that defendant's reasons for refusing to increase her salary at the end of her first year were a pretext for discrimination. None of plaintiff's arguments suggest any deficiency in the court's evaluation of the evidence. Defendant does not contend that plaintiff was

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proffered reasons for taking the actions it did.

Plaintiff argues that the conflict issue is suspicious as an explanation for failing to offer her a shareholder position during her second year because it did not surface until plaintiff asserted her right to equal pay following the May 1995 shareholder's meeting.

However, defendant Vondale testified that she initially raised the issue in March 1995, at a special meeting of the board of directors. Id. at 16-23. Thus, the court determined that plaintiff failed to raise any material question over defendant's proffered reasons for taking the actions it did.

denied shareholder status because a conflict issue arose. Plaintiff misunderstands the argument entirely. Rather, defendant provided admissible evidence to show that two female shareholders objected vehemently to the *manner* in which plaintiff handled the situation. Therefore, it is irrelevant whether another attorney would approach these shareholders if he had a conflict and it is certainly true that conflict problems in a firm that represents insurance companies are "routine." Whether or not the two individual defendant shareholders refused to meet with plaintiff has no impact on whether plaintiff established a fact question with respect to whether these two attorneys opposed her elevation to shareholder or that they had the requisite number of votes in support of their position.

D. Defendant's Alleged Discriminatory Comments

Plaintiff argues that defendant Coon's comment about "fungible goods" raises a fact question about whether defendant's proffered reasons for taking the actions it did are mere pretext. Plaintiff fails to present any evidence or argument to indicate that the court was misled on this point. To the contrary, plaintiff's new affidavit changes her testimony with respect to this comment. In plaintiff's original deposition she stated that defendant Coon referred to *secretaries* as "fungible goods."[5] In her new affidavit, plaintiff

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[5]Plaintiff's deposition testimony reads as follows:

> "Okay. Mr. Coon had a tendency to make condescending comments. He referred to secretaries, for example, as fungible goods. He did not treat them as members of any kind of

alleges that Coon referred to female *staff,* presumably including female attorneys, in this matter. Plaintiff's Motion, Exh. B, ¶¶ 9, 10.

Defendant averred that the firm employed both male and female secretaries, and now for the first time plaintiff informs the court that she has knowledge of only one male secretary and that he was employed briefly and only after she left the firm. Id. ¶ 9. She also states in her new affidavit that defendant Coon said that female attorneys do not need the money they earn on the job, while in her deposition plaintiff stated that Coon made this comment about individual defendant Vondale only. The court will not consider this new testimony, as plaintiff had a full opportunity to raise this issue when the case was originally before the court on cross motions for summary judgment.[6]

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professional team."

Plaintiff's Response to Defendant's Motion for Summary Disposition, Exhibit C, Plaintiff's Deposition, p. 191.

[6]Further, defendant Coon is the shareholder who originally met with plaintiff and recommended that the firm extend her an offer of employment. In Town v. Michigan Bell, 455 Mich. 688, 701 (1977), the Michigan Supreme Court chose to apply the "same actor" inference in an age and sex discrimination case. Under this doctrine, an employer is entitled to a strong inference that discrimination was not a factor where the same person hired the plaintiff and took the adverse action complained of within a relatively short time span.

E. Unjust Enrichment

Plaintiff argues that the court failed to address her claim of unjust enrichment after her first year with the firm. However, the court addressed this issue on page 16 of its Opinion, which begins "[i]n count five plaintiff alleges a breach of express and implied contract and unjust enrichment."

Essentially, plaintiff argues that the firm was not justified in taking its portion of her receipts for the second year of her employment because she only brought clients to the firm based upon the representation that she would be compensated as a shareholder after her one year contract expired.

In Barber v. SMH (U.S.) Inc., 202 Mich. App. 366, 375 (1993), the court held that a claim of unjust enrichment can only lie where there is not an express contract. The Barber court determined that a claim of unjust enrichment is allowed to imply a contract in order to prevent one party from unjustly benefitting from another. Id. As the court noted in its Opinion, plaintiff's employment was initially governed by a one year written contract. When that contract expired, the firm offered plaintiff the opportunity to continue under the same terms for a second year. Plaintiff presented no evidence to show that this offer was not extended to her, or that she believed she was working under any other terms than her first contract provided. Accordingly, the court found that plaintiff had an express contract covering the terms of her employment and her claim of unjust enrichment was dismissed.

F. Breach of Contract

Plaintiff contends that the court failed to address her arguments regarding her breach of contract claim. Plaintiff argues that the court should have considered parole evidence that defendant promised to take a vote on making plaintiff a shareholder at the conclusion of her one year contract. First, the court dealt with this issue in full, but more importantly, the firm *did* consider whether to offer plaintiff a position as a shareholder at its May 1995 meeting. There is uncontroverted evidence that the majority of shareholders opposed extending this offer to plaintiff, and that a formal vote was unnecessary. Therefore, even if plaintiff were permitted to testify about an oral promise to vote on her status at the end of her first year, as a matter of law, defendant did not violate any alleged promise.

G. Constructive Discharge

Plaintiff makes no new arguments that would indicate to the court that it was misled with respect to the law or the facts when it granted defendant's motion for summary judgment on plaintiff's claim of constructive discharge. Accordingly, the court will not review this portion of its Opinion.

III. CONCLUSION

For all of the reasons stated above, the court will deny plaintiff's motion for reconsideration. Essentially, plaintiff's motion reargues nearly all of the key points raised in the cross motions for summary judgment. After a thorough review of the evidence and arguments, the court remains convinced that

neither it nor any of the parties were misled or that a palpable defect existed in the court's reasoning or conclusions. Accordingly,

IT IS ORDERED that plaintiff's motion for reconsideration is denied.

/s/_____
BERNARD A. FRIEDMAN
United States District Judge

Dated: NOV 25 1998
Detroit, Michigan

Copies sent to: Scott E. Combs, Esq., Daniel J. Bretz, Esq.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Filed August 5, 1998]

Civil Action No. 97-CV-71559-DT

NANCY KAHN,
Plaintiff,

vs.

DEAN & FULKERSON, P.C., LARRY M. BOLTON, GEORGE BURNARD, READ A. CONE, III, WILLIAM G. COON, JAMES P. DEAN, JOHN L. GIERAK, PAUL R. GILLERAN, JEROME C. GROPMAN, CLARENCE L. HUDSON, JEFFREY L. HUDSON, IAN R. HUNTER, JANET E. LANYON, LAURENCE M. LUKE, THOMAS P. MARTIN, PAUL J. MASTRANGEL, ROBERT L. MERCADO, DONALD A. PIERCE, JR., DAVID L. TENNENT, RICHARD J. TENNENT, CAROL L. VONDALE,
Defendants.

HON. BERNARD A. FRIEDMAN

OPINION AND ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

and

OPINION AND ORDER DENYING PLAINTIFF'S CORRECTED MOTION FOR PARTIAL SUMMARY JUDGMENT

and

ORDER DENYING INDIVIDUAL DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS MOOT

I. INTRODUCTION

This is an employment dispute between Nancy Kahn, a lawyer, and her former law firm and all of its partners. Plaintiff's seven count complaint alleges a violation of the Equal Pay Act, fraud and misrepresentation, conversion, conspiracy, breach of an express and implied contract, unjust enrichment, tortious interference with a contract and sex discrimination in violation of the Elliott-Larsen Civil Rights Act.

Plaintiff practices environmental law, and was hired by defendant Dean & Fulkerson ("the firm") on May 6, 1994. When plaintiff's former law practice dissolved, she applied to work for the firm. All shareholders and some associates at the firm receive compensation based on the following formula ("the formula"):

1. The attorney must pay his or her own individual overhead and the shared overhead of the firm.

2. The attorney receives 82% of the fees on matters they have personally billed.

3. The attorney receives 18% of the remaining fees billed by themselves or others on clients which they have originated.

Plaintiff states that she applied to the firm and was interested in being paid with the formula, however she sought to delay her responsibilities for overhead until receipts began to come in. Defendants responded by offering her a reduced compensation formula with no overhead payments.[1] Plaintiff agreed to be paid on this basis for her first year, from May 6, 1994, through May 6, 1995, by signing a written contract which was prepared and signed by plaintiff and a representative of the firm.

Plaintiff contends that defendants agreed to begin compensating her according to the standard formula at the end of her first year, and that at the same time a vote would be taken regarding her admission as a shareholder member of the firm. However, neither of these alleged promises are contained in the written contract, which has an integration and

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[1]Plaintiff's formula was based upon a 60/40 split of her billings up to $150,000, with the firm taking sixty percent, and a 50/50 split after that.

merger clause stating that the contract forms the entire agreement of the parties and that no modification shall be valid unless it is in writing and signed by both plaintiff and the President of the firm.

Plaintiff alleges that when May 6, 1995 rolled around, defendants did not switch her compensation to the formula, and they did not take the agreed upon vote on her admission to the firm as a shareholder. Instead, a shareholder meeting was held on May 22, 1995, and a vote was taken to extend plaintiff's contract for an additional year. Plaintiff contends that she had an excellent performance record during her first year, and that both her clients and firm shareholders expressed nothing but satisfaction with her work. During this year plaintiff brought in revenues in excess of her own expectations and in excess of the firm's projections for her.[2]

Plaintiff also contends that one client paid the firm a $300,000 bonus, or success fee, and that she should have been paid a significant portion of this because she was the only attorney who managed certain environmental aspects of the transaction. Instead, plaintiff claims the firm failed to inform her of the payment, hid the money in a client trust account, and waited to disperse it until after she left their employ. Defendants respond that the firm received this one time payment from a long-time client, ElectroWire Products, and that the funds were given to attorney Luke who was primarily responsible for the case. They further contend that

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[2]Plaintiff states she generated $322,323 in total billings, $232,239 of which was from her own clients. She asserts that only three shareholders billed more hours than this.

Luke allocated this bonus entirely on his own, and according to no particular formula. Plaintiff states that after she complained about the bonus, she "apparently" received $5-6,000, while defendants assert that she was paid $15,000 of the bonus. Defendants state that this amount was greater than that received by more than six other attorneys, including two men who worked more hours on the transaction and four male shareholders who worked for the client in the past.

Plaintiff further alleges that the head of the Professional Personnel Committee, Mr. Coon, remarked that a different female attorney "did not need the money" she made at the firm because her husband was a well paid attorney. Plaintiff's husband is also an attorney. Plaintiff also contends that Coon said that secretaries at the firm, who are largely female, are "fungible" goods. Finally, plaintiff complains that one shareholder expressed doubt about her being hired in the first instance because of "pre-existing responsibilities" and time needed for "personal matters." Plaintiff explains, and defendants do not deny, that this reference is to her children and family.

Eventually, in December 1995, plaintiff notified the firm that she would be resigning effective March 1996. Plaintiff claims that after she announced her resignation, the firm began to unilaterally charge her for secretarial services, and took $2000 in advanced client costs. She also states that the firm refused to apply payments for work she performed and instead applied them to other firm attorneys. Plaintiff seeks recovery of all of these funds.

Defendants contend that during plaintiff's first year at the firm a problem arose surrounding a conflict of interest

between some of plaintiff's clients and Amerisure, which was a client of two partners, Lanyon and Vondale[3]. By the time of the May shareholder's meeting, Lanyon and Vondale stated they were opposed to having plaintiff become a shareholder based on the way plaintiff handled this problem. The firm requires a super-majority in order to ratify a new shareholder, which means that five "no" votes can defeat a candidate's bid to become a shareholder. Lanyon and Vondale indicated they were opposed to having plaintiff join the firm as a shareholder, and there were four other known "no" votes. Consequently, the shareholders decided not to take the vote and to extend plaintiff's contract for an additional year. Shareholder Luke testified that they wished to spare plaintiff the embarrassment of being rejected as a shareholder or terminated from employment. See Defendants' Brief, Luke Aff. Other defendants testified that they hoped plaintiff would redeem herself and still become a shareholder in the future.

Plaintiff states she was replaced by a male attorney who was paid according to the firm's standard formula, and that she was forced out as soon as he began to bill at a rate comparable to her previous year's revenues.

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[3]These two defendants are both women, and were the only shareholders who spoke in opposition to plaintiff joining the firm as a shareholder at the May 22, 1998 meeting. Apparently Lanyon held one proxy and Read Cone, another shareholder, held his own vote plus two proxies. Cone stated that upon hearing Lanyon and Vondale's opinions he concurred in their judgment.

II. ANALYSIS

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is not a genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. The moving party has the initial burden of showing the absence of a genuine issue of material fact as to an essential element of the non-moving party's case. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472 (6th Cir. 1989)(citing *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)).

Once the moving party satisfies its burden, "the burden shifts to the nonmoving party to set forth specific facts showing a triable issue." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). To demonstrate a genuine issue of material fact, moreover, the party opposing the summary judgment motion must present sufficient evidence to justify a jury in reasonably finding in favor of the non-movant; presentation of a mere scintilla of evidence is insufficient. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

A. ELLIOTT-LARSEN CIVIL RIGHTS ACT - SEX DISCRIMINATION

In order to establish a prima facie case of sex discrimination, plaintiff must show that (1) she was a member of a protected class; (2) she was discharged (or suffered from an adverse employment action); and (3) she was qualified for the position. *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973). Michigan courts have applied the same standard

in cases brought pursuant to Michigan's Elliott-Larsen Civil Rights Act as are applied in federal Title VII discrimination cases. *Matras v. Amoco Oil Co.*, 424 Mich. 675, 385 N.W.2d 586 (1986).

The plaintiff bears the initial burden of establishing a prima facie case of discrimination. *McDonnell-Douglas*, 411 U.S. 792. If she succeeds in doing so, the burden shifts to defendants to articulate a legitimate, non-discriminatory reason for its actions. The burden then shifts back to plaintiff to show that the stated reasons are pretextual, and also that illegal discrimination was more likely the defendants' true motivation. *Lytle v. Malady*, 209 Mich. App. 179, 187, 530 N.W.2d 135 (1995) (citing *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993)). In *St. Mary's Honor Center*, the Supreme Court clarified that even if plaintiff can show that the employer's proffered reasons are not the real reasons for its actions, she must still be able to show by a preponderance of the evidence that defendants' true motive was to discriminate. *Id.*

In the present case, the court will presume that plaintiff can establish a *prima facie* case of discrimination even though defendants argue that plaintiff's contract was for one year, and they never terminated plaintiff's employment. Plaintiff is clearly female, the firm did not complain that she was unqualified as an attorney, and they did not vote to make her a partner with the knowledge that she would be likely to leave the firm as a result. Thus, defendants must articulate a non-discriminatory reason for the action it took.

In the present case, defendants assert that they were under no obligation to make plaintiff a shareholder in the

firm, however even if they were, their reason for extending her contract an additional year instead of voting for her to become a shareholder were non-discriminatory. In fact, defendants point out that the only two shareholders to speak against plaintiff joining the firm were female, and they lacked any discriminatory intent. Rather, they were dissatisfied with the manner in which plaintiff handled the conflict of interest situation, including how she communicated with them and their client about the problem. Although defendants had no obligation to make plaintiff a shareholder, they articulated a non-discriminatory reason for refusing her this promotion. Consequently, plaintiff bears the burden of showing that defendants took the actions they did because of her sex, and that any reasons they may offer are mere pretext for unlawful sex discrimination.[4]

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[4]Plaintiff also alleges that she was constructively discharged from employment with the firm. However, constructive discharge is not in itself a cause of action. *Vagts v. Perry Drug Stores,* 204 Mich. App. 481, 487, 516 N.W.2d 102 (1994). "Rather, constructive discharge is a defense against the argument that no suit should lie in a specific case because the plaintiff left the job voluntarily. Thus, an underlying cause of action is needed where it is asserted that a plaintiff did not voluntarily resign but was instead constructively discharged." *Id.* A constructive discharge is established where "an employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation or, stated differently, when working conditions become so difficult or unpleasant that a reasonable person in the employee's shoes would feel compelled to resign." *Id.* at 488. (citations omitted).

In the instant matter, the court does not find that plaintiff has an underlying cause of action, and further, there is no evidence

Plaintiff claims that individual defendant Coon's comment that secretaries are "fungible goods" and that a female attorney did not need the money she made at the firm because of her husband's income shows a predisposition to discriminate on the basis of sex. As to the first comment, the firm employed both male and female secretaries. Although these comments are not particularly thoughtful, and they appear to show a certain lack of respect for women in the workplace, neither are actionable as sex discrimination.

In *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989), the Supreme Court considered the case of a female accountant who was denied partnership in an accounting firm. In Price Waterhouse, the plaintiff presented evidence that male partners made a series of sex stereotyped comments *about her* that were considered during her partnership evaluation. *Id.* Specifically, one partner stated that the plaintiff needed to attend charm school, while another complained that she was

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showing that working conditions were so intolerable that a reasonable person would be forced to resign. The firm decided not to promote plaintiff to the status of shareholder at its May 22, 1995 shareholders meeting, and it is clear that at least some shareholders believed this would cause plaintiff to evaluate whether or not she wished to remain with the firm. However, there are many reasons an attorney would decided not to stay at a firm where she is denied shareholder status that do not amount to constructive discharge. Indeed, in this case plaintiff did not notify the firm of her resignation until December, 1995, when she gave over three months notice of her resignation. These facts indicate that the working environment was far from intolerable. Accordingly, plaintiff has failed to raised any questions of material fact regarding her claim of constructive discharge.

"macho" and "overcompensated for being a female." *Id* at 235. One male partner went so far as to recommend, in writing, that the plaintiff "walk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.*

The Price Waterhouse Court found that:

> [r]emarks at work that are based on sex stereotypes do not inevitably prove that gender played a part in a particular employment decision. The plaintiff must show that the employer actually relied on her gender in making its decision. In making this showing, stereotyped remarks can certainly be evidence that gender played a part in making its decision.

Id. at 251. The Court went on to find that the remarks in that case were not "stray comments," and therefore were evidence of sex discrimination. *Id.*

In the instant case, plaintiff has shown no connection between defendant Coon's comments and the decision not to take a vote on making her a partner or the distribution of the ElectroWire bonus. Indeed, Coon is the shareholder who recommended that plaintiff be hired, and he is one of the shareholder's who supported her admission as a shareholder.

Plaintiff also points to the written comment from individual defendant Mastrangel, who opposed hiring plaintiff initially. Among other concerns, Mastrangel was concerned that plaintiff projected only being able to bill 1500 hours per

year due to "pre-existing" obligations, which plaintiff states is a reference to her family. This comment is quite different from those attributed to Coon. Here, Mastrangel is stating that plaintiff does not estimate that she'll be able to work as much as defendants would like her to. Merely saying that a job candidate states she cannot work beyond a certain number of hours because of a commitment to her family is not actionable sex discrimination.[5] Further, Mastrangel was against hiring plaintiff in the beginning, but he was opposed by other shareholders and plaintiff was hired.

Plaintiff's proofs fail to raise a material question of fact surrounding whether defendants discriminated against her on the basis of sex. Even if the court grants that plaintiff can establish a prima facie case of sex discrimination, defendants have articulated a non-discriminatory reason for taking the actions they did, and plaintiff has not presented anything more than stray remarks to show that defendants' explanation was mere pretext for unlawful discrimination.

B. Equal Pay Act

In order to establish a prima facie case under the Equal Pay Act (the "Act"), plaintiff must show that different

---

[5]Plaintiff points to one additional situation where a male shareholder allegedly told her not to speak at a client meeting, and also remarked in the presence of a client "that there was a sign in front of Plaintiff and that she should read the sign." Plaintiff testified that this shareholder apparently meant that plaintiff should be able to tell that a certain person was dishonest. Perhaps the shareholder's comments were a bit rude, but there is no evidence that they were said because of plaintiff's sex.

wages are paid to employees of the opposite sex and the employees perform equal work which requires equal skill, effort, and responsibility, and which is performed under similar working conditions. *Corning Glass Works v. Brennan,* 417 U.S. 188 (1974). Once plaintiff has carried this burden of proof, the burden shifts to the employer to show that the differential is justified under one of the Act's four exceptions, which allow differential payment pursuant to (1) a seniority system; (2) a merit system; (3) a system which measures earnings by quantity or quality of production; or (4) a differential based on any other factor other than sex. *Id.* at 196; *Timmer v. Michigan Dept. of Commerce,* 104 F.3d 833, 843 (6th Cir. 1997).

Plaintiff points to attorney James O'Brien to establish her *prima facie* case. O'Brien is the only other environmental attorney at the firm who is not a shareholder and who was hired after plaintiff was hired. O'Brien estimated that he'd have approximately $100,000 in billings his first year, just as plaintiff did, yet he was hired under the firm's traditional formula. Both attorneys had an excess of ten years of experience when they began with the firm, although O'Brien had been a self-sufficient solo practitioner who billed in excess of $100,000 per year, while plaintiff had never been self-sufficient and had never billed more than $69,000 in one year. Plaintiff alleges that if she had been paid as O'Brien was paid she would have made an additional $27,970 in her first year and $96,404 from May 5, 1994, to the present. Viewing the facts in a light most favorable to plaintiff, the court finds that plaintiff can establish a *prima facie* violation of the Equal Pay Act.

Defendants argue that any pay differential between plaintiff and O'Brien is based on "any factor other than sex," and specifically that plaintiff requested the alternative salary arrangement. Defendants contend that they offered the standard formula to plaintiff, and the only reason she did not end up with it was her own concern about paying the overhead costs inherent in the shareholder formula. Indeed, plaintiff testified that she was fearful that the standard formula could leave her without a paycheck and owing money to the firm in the early weeks and months, and that *she*, not the firm, proposed a contract arrangement. *See* Plaintiff's Dep., pp. 44, 49. Moreover, plaintiff's initial letter of inquiry to the firm indicates that she was "willing to consider an of counsel or contract arrangement with some salary flexibility dependent upon the amount of work generated by my clients and the amount of work your office has available." Defendants' Ex. 1.

Based upon the evidence in this case, defendants have shown that any pay differential between plaintiff and O'Brien was based upon plaintiff's request for a deferral of expenses and her interest in negotiating a contract arrangement for her first year on the job. Although plaintiff argues that a fact question exists over which party requested the contract plaintiff signed, the record shows unequivocally that:

1. Plaintiff's letter of inquiry suggested such an arrangement.

2. Plaintiff's deposition testimony confirms that she requested a modification of defendants' standard

formula to defray her obligation to cover her expenses.

3. Plaintiff is a skilled attorney who negotiated her own employment contract.

4. Plaintiff admits she was offered the firm's standard formula and she requested a modification of it. Plaintiff's Dep. pp. 48-49

5. O'Brien was offered the standard formula and accepted it.

Plaintiff also argues that defendants violated the Act with respect to her second year on the job because the firm could have adjusted her pay without making her a shareholder member. Defendants argue, again, that they had reasons other than plaintiff's sex for refusing to offer plaintiff the firm's standard formula at this point. Specifically, female shareholders Vondale and Lanyon opposed plaintiff joining the firm as a shareholder, while others wished to have plaintiff continue under her contract in order to redeem herself. Although the firm *could* have changed plaintiff's salary formula, it was not obligated to and defendants have articulated a reason for taking the actions they did that is based upon something other than sex.

Next, plaintiff argues that the firm's failure to pay her a larger portion of the ElectroWire bonus is actionable under the Act. Although the parties spend many pages detailing the facts of this transaction, the issue is simple. The $300,000

"bonus" from ElectroWire was paid at the suggestion of shareholder Luke, and he alone received the money and divided it among others at the firm who worked on the case. Luke kept none of the bonus for himself, and Kahn was paid some portion -- $15,000, if defendants' records are accurate, or $5-6,000, if plaintiff is to be believed. Luke testified that he divided the bonus among attorneys based upon (1) length of service with the client, (2) hours spent on the transaction, and (3) his overall impression of the attorney's work on the case. See Defendants' Response, Luke Affidavit. Plaintiff has presented no evidence to show that Luke's allocation of the bonus was based upon sex.

Plaintiff complains that she only received her payment after learning from a non-shareholder about the bonus and confronting Luke about her share of it. However, Luke testified that he told no one at the firm about the bonus, and information was not withheld from plaintiff based upon her sex. See Defendants' Response, Luke Affidavit. Plaintiff raises a variety of additional issues surrounding what account the bonus was placed in, whether taxes were paid appropriately, and more, however they are all irrelevant to whether defendants discriminated against plaintiff on the basis of her sex with respect to the distribution of this money.

Defendants have presented admissible evidence to show that any pay differential between plaintiff and O'Brien was based upon factors other than sex, and that plaintiff's portion of the ElectroWire bonus was not determined by her sex. For these reasons, the court will grant defendants' motion for summary judgment as to count one and deny plaintiff's corrected motion for partial summary judgment.

C. Breach of Contract

In count five plaintiff alleges a breach of express and implied contract and unjust enrichment. Essentially, plaintiff alleges that certain shareholders made oral promises to her before she signed her one year employment contract. The court will grant defendants' motion for summary judgment as to this count for the following reasons:

1. Plaintiff's contract has an integration and merger clause that supersedes any prior agreements between the parties.

2. The written contract is an express contract which supersedes an implied contract between the same parties on the same subject. See *Scholz v. Montgomery Ward & Co. Inc.*, 437 Mich. 83, 93 (1991).

3. The parole evidence rule precludes admission of extrinsic evidence to contradict the terms of a written contract that was intended by the parties to be a complete expression of their agreement.

4. Any contract formed prior to plaintiff's written employment contract regarding promises to be performed after it expired is void under the statute of frauds. "An agreement, contract, or promise, that, by its terms, is not to be

> performed within one year, is void, unless it is in writing and signed by the party to be charged with the agreement, contract or promise." M.C.L. § 566.132(a).

With respect to count five there is no dispute over any material facts, and as a matter of law, defendants must prevail.

D. Fraud

In count two plaintiff alleges fraud and misrepresentation by defendant Coon, who was the shareholder who conducted pre-hiring discussions with plaintiff. In order for conduct to be actionable as fraud, plaintiff must prove:

> (1) that defendants made a material misrepresentation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted and suffered in reliance upon it; and (6) that he thereby suffered injury.

Hi-Way Motor Co. v. Int'l Harvester Co., 398 Mich. 330, 336, 247 N.W.2d 813 (1976). Each element must be proven with a reasonable degree of certainty, and all of them must be found to exist. The absence of any one of them is fatal to

recovery. *Id.* Further, an action for fraud must be based upon a statement relating to a past or existing fact. Future promises are contractual and do not constitute fraud. *Id.*

Plaintiff's fraud action must be dismissed for several reasons. Plaintiff is claiming that defendant Coon promised her that she would be compensated under the standard formula after one year, and that a vote would be taken at that time on whether to offer her a position as a shareholder. Although Coon denies ever making these promises, plaintiff has no evidence that if he did make them he knew them to be false or that he made them recklessly. Moreover, the alleged promises relate to future conduct, not past or existing facts, and therefore are not actionable as fraud. In addition, the parole evidence rule works to exclude evidence of negotiations where a contract is clear and unambiguous. *Goodwin, Inc. v. Coe,* 392 Mich. 195, 204 (1974)(citations omitted). Plaintiff would be using this evidence to convince the court that her written contract was not a complete integration of the parties' intentions, and therefore it should be excluded. The court will, therefore, grant defendants' motion for summary judgment as to count two.

E. Tortious Interference with Contract

In count six plaintiff alleges shareholders Coon, Luke and Tennent interfered with her employment contract by failing to cause a vote on her shareholder status and failing to pay her more of the ElectroWire bonus. Because plaintiff presented absolutely no evidence that she was ever promised or guaranteed any portion of the ElectroWire bonus, there can be no claim of tortious interference. Further, plaintiff has not

presented any admissible evidence that there was ever a commitment to hold a vote on making her a shareholder.

F. Conversion

In count three plaintiff alleges that the firm had no right, title or interest to *any* of the gross receipts based upon plaintiff's work after the end of her first year because there was no longer any contract in effect between the parties. Defendants argue that they offered to extend plaintiff's written contract for an additional year, and she accepted that offer by continuing to work at the firm. Thus, defendants argue that there was a valid contract in effect after plaintiff's first year. The court agrees, given that plaintiff's view of the facts would suggest that she was being forced to remain with the firm against her will, or that despite continuing to work on defendants' premises, she owed the firm no portion of her receipts.

G. Conspiracy

Finally, plaintiff argues in count four that the individual members of the firm "conspired and confederated through the underlying torts of fraud, misrepresentation, breach of contract, interference with contract, and conversion" to deprive plaintiff of the compensation and bonus she was entitled to. Because the court will grant defendants' motion for summary judgment as to the six underlying torts, there can be no action for conspiracy to commit these torts.

III. CONCLUSION

For all of the reasons stated above, the court will grant the defendants' motion for summary judgment and deny plaintiff's corrected motion for partial summary judgment as to her Equal Pay Act claim. The court need not review the individual defendants' motion for summary judgment, as the issues are already disposed of by the firm's motion. Accordingly,

IT IS ORDERED that defendants' motion for summary judgment is granted and this case is dismissed with prejudice.

IT IS FURTHER ORDERED that plaintiff's corrected motion for summary judgment is denied.

IT IS FURTHER ORDERED that individual defendants' motion for summary judgment is denied as moot.

/s/_____
Bernard A. Friedman
United States District Judge

Dated: 8-5-98
Detroit, Michigan

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed January 12, 2001]

No. 99-1015

Nancy L. Kahn, *Plaintiff-Appellant*,	)
v.	)
Dean & Fulkerson, P.C., et al. *Defendants-Appellees*.	)

BEFORE: GUY and MOORE, Circuit Judges; and DOWD, District Judge.*

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

*Hon. David D. Dowd, Jr., Senior United States District Judge for the Northern District of Ohio, sitting by designation.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Moore would grant rehearing for the reasons stated in her dissent.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk

APPENDIX E

MEMORANDUM FROM WILLIAM G. COON TO ALL SHAREHOLDERS OF DEAN & FULKERSON, P.C.

[Dated March 16, 1994]

Attached hereto is a copy of the resume of Nancy L Kahn and her accompanying letter of transmittal.

As reflected in her resume, Ms. Kahn fits two of the leading criteria for a new attorney as indicated from the results of the recent P.P.C. Survey, namely:

- environmental attorney
- over 10 years experience

Janet Lanyon and I interviewed Ms. Kahn on March 15th over a period of approximately 3 hours. Ms. Kahn seems to have the experience reflected in her resume and is interested in focusing her career on environmental law practice. Janet and I both believe that this opportunity should be pursued and, with that in mind, we requested Ms. Kahn to provide references and writing samples.

Ms. Kahn indicted that she controls approximately $100,000 in billings and has received commitments from two major environmental clients. While this level of billing does not make her self-sufficient, she is willing to take the economic risk inherent in the D&F system and seeks, at most,

a 60-90 day deferral of expenses to the extent they are not covered by collections.

There is some urgency involved in Ms. Kahn's situation. The firm she is with will cease to exist on April 1st, so she is under pressure to make arrangements. She has an opportunity to join a firm, but she is attracted to our system and would like to pursue the possibility of joining D&F as long as it won't take too long. If we are interested, we should be prepared to act quickly or tell her to take her other opportunity.

Very shortly, we well arrange to have each of you meet Ms. Kahn in person, either individually or in some form of group meeting. I would appreciate your comments and expression of your desires in that regard.

Please let me know if you have any questions or cómments.

/s/_____

attachments

APPENDIX F

7.01

OVERVIEW OF FISCAL SYSTEM

A. Profit Center Principle

The fundamental premise underlying the economic structure of the firm will be that each attorney is an individual profit center as each attorney will have directly allocated income and expense items based on individual performance and costs. Subject to the right of any two or more attorneys making any economic arrangement amongst themselves as they may desire the receipts for client services shall be allocated as follows:

Billing/Originating Attorney*	8%
Contributing/Producing Attorney	82%
Law Firm - the 5% miscellaneous charge	

*Note: This may be the law firm if client is attributable to it in distinction to individual attorney.

Each attorney shall be responsible for funding all direct costs and allocable share of general overhead costs incurred by that attorney (as reduced by the 5% miscellaneous charge).

B. Fee Methodology and Rates.

The general system of fees shall be on a hourly rate basis with each attorney setting a minimum hourly rate for each type of service area and no attorney may commit any other attorney's services and rates beneath those minimums without the consent of the latter. Specialized fee arrangements outside of the normal hourly rate arrangements can be made only with the consent of all of the attorneys who might be responsible or producing attorneys regarding that matter. In extraordinary fee situations the attorneys involved are free to allocate, receipts by agreement on a case by case basis.

APPENDIX G

MINUTES OF SPECIAL MEETING OF BOARD OF DIRECTORS/SHAREHOLDER OF DEAN & FULKERSON, P.C.

April 13, 1994

A Special Meeting of the Board of Directors and Shareholder of Dean & Fulkerson, P.C. was held on April 13, 1994 at 6:00 p.m. The following Directors were present in person:

George W. Burnard
A. Read Cone III
-William G. Coon
James P. Dean
Jerome S. Fanger
John L Gierak
Paul R. Gilleran
Jerome C. Gropman
Jeffrey L. Hudson
R. Ian Hunter
Janet E. Lanyon
Laurence M. Luke
Paul J. Mastrangel
Patricia M. Morrow
Donald A. Pierce
David L Tennent
Carol L. Vondale

The following Directors were present by proxy:

Larry M. Bolton
James W. Goss
Clarence L. Hudson
Thomas P. Martin
Robert L Mercado
Richard J. Tennent

George J. Fulkerson was present at the invitation of the Board, James P. Dean, President, acted as Chairman and Paul R. Gilleran acted as Secretary of the meeting.

The Chairman called .the meeting to order at 6:05 p.m. and announced that all Shareholders and Directors were present either in person or by proxy and, as such, a necessary quorum was present for the transaction of business and the resolution of a supermajority issue.

The report of the Professional personnel Committee was delivered by William Coon, Chairman and the Committee recommended that the firm offer employment to Nancy Kahn upon the economic terms outlined by Mr. Coon. Paul J. Mastrangel, a member of the Committee, presented an opposing point of view.

Thereafter, the Shareholders and Directors engaged in a lengthy discussion concerning the merits of the Committee proposal and the candidate.

After discussion and upon motion duly made and seconded, the following resolution was adopted by a supermajority (yea votes having been cast by 21 members of

the firm, with one member voting no and one member abstaining):

> RESOLVED, that the firm make an offer of employment to, and if-accepted, hire Nancy Kahn as an attorney/employee of the firm based upon the Proposed Financial Arrangement recommended by the Professional Personnel Committee (a copy of which is attached to this Resolution).

There being no further business to come before the meeting, the meeting was adjourned at *approximately* 7:00 p.m.

/s/_____
Paul R. Gilleran, Secretary

Approved By:

/s/_____
James P. Dean, Chairman

PROPOSED FINANCIAL ARRANGEMENT

The firm will provide the employee the following:

- furnished office (with computer)
- 1/2 secretary
- standard insurance benefits (health, disability, life)

The employees allocated fees generated from invoices for services performed during the first twelve months of employment will be divided as follows:

up to $150,000	-	employee: 60%
	-	firm: 40%
over $150,000	-	employee: 50%
	-	firm: 50%

Any amount due to employee under the foregoing formula will be deemed gross wages to employee subject to the usual federal and state payroll taxes.

Results of proposed formula assuming various billing amounts:

Amount	$100,000	$150,000	$200,000
Originated	50,000	75,000	100,000
Contributing	50,000	75,000	100,000

Allocated Fees*	$ 91,500	$137,250	$183,000
Income To:			
Employee	$ 54,900	$ 82,350	$106,500
Firm	36,600	54,900	76,500

* 100% originated; 82% contributing

Estimated incremental costs:

½ secretary	$18,000
malpractice ins.	2,000
health, etc. ins.	2,500
taxes, work. comp.	5,000
	$27,500

APPENDIX H

MINUTES OF REGULAR MEETING OF BOARD OF DIRECTORS/SHAREHOLDERS OF DEAN & FULKERSON, P.C.

May 22, 1995

A regular meeting of the Board of Directors/Shareholders of Dean & Fulkerson, P.C. was held on Monday, May 13, 1996 at 6:00 p.m. The following directors were present in person:

George W. Burnard
A. Read Cone, III
James P. Dean
John L Gierak
Paul R. Gilleran
Janet E. Lanyon
Laurence M. Luke
Paul J. Mastrangel
Patricia M. Morrow
Donald A. Pierce, Jr.
Carol L. Vondale

The following directors were present by proxy:

Present by proxy:	Proxy held
Larry M. Bolton	George W. Bumard
William G. Coon	Janet E. Lanyon
James P. Dworman	James P.Dean

James W. Goss	Laurence M. Luke
Jerome C. Gropman	James P. Dean
Jeffrey L. Hudson	George W. Burnard
R. Ian Hunter	A. Read Cone III
Thomas P. Martin	Paul J. Mastrangel
Robert L. Mercado	A. Read Cone III
Donald A. Pierce	James P. Dean
David L. Tennent	George W. Burnard

The following Directors were absent without proxy:

C. L. Hudson
Richard J. Tennent

Marianne Sheppard, Firm Administrator, was also present.

James P. Dean, President, acted as Chairman of the meeting and Patricia M. Morrow acted as Secretary of the meeting. The Chairman called the meeting to order at 6:00 p.m. and stated that the necessary quorum was present for the transaction of business.

The minutes of the March 25, 1995 minutes of the special meeting of the Board of Directors and the minutes of the April 22, 1995 regular meeting of the Board of Director were read and approved.

President's Report:

A. The next meeting will be the annual Secret Meeting to be held at Shark Creek.

B. Nominations for the offices of President, Secretary and Treasurer will be received at the June 21, 1996 meeting and a special meeting of the Board of Directors will be held on June 26, 1995 for the sole purpose of electing the officers. Proxies will be allowed.

C. The Firm picnic will be held at Boulan Park on July 20, 1995.

Marketing Committee:

John Gierak presented the Marketing Committee report and informed members that the second Firm Newsletter had been mailed. A happy hour is planned to review members' mailing lists and Julie Savarino is assisting members with individual marketing plans.

Professional Personnel Committee:

Janet Lanyon presented the report in William Coon's absence. The major matter is the status of Nancy L. Kahn which will be addressed in greater detail under New Business.

Professional Practice Groups:

Environmental Law: Paul Mastrangel informed members that a meeting had been held three weeks ago. He stressed the need to attract a full time environmental law attorney due to increasing need for such representation. He recommended placing ads in legal periodicals. He referred the matter to the Professional Personnel Committee for further investigation and action.

* * * * *

C. Employment Status of Nancy Kahn: In the absence of William Coon, Chairman Dean advised the members that Nancy Kahn's employment contract with Dean & Fulkerson was due to expire. The Professional Personnel Committee had therefore met and after review and consideration of all the factors involved formulated their recommendation that the Firm extend Nancy Kahn's employment contract for another year on the same terms rather than placing Ms. Kahn on the partnership track at this time. After discussion and upon motion duly made and seconded a supermajority of the members adopted the following resolution:

> RESOLVED, that Nancy Kahn's employment contract with the Firm be continued on the same terms and conditions for the period of one year.

There being no further business to come before the meeting, the meeting was adjourned

/s/_____
Patricia M. Morrow, Secretary

Attest:

/s/_____
James P. Dean, Chairman

APPENDIX I

STATUTORY PROVISIONS

The Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1) Prohibition of Sex Discrimination

No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (1) a seniority system; (2) a merit system; (3) a system which measures earnings by quantity or quality of production; or (4) a differential based on any other factor other than sex.

Michigan's Elliott Larsen Civil Rights Act, MCLA §37.2202(1)

(a) Fail or refuse to hire, or recruit, or discharge, or otherwise discriminate against an

individual with respect to employment, compensation, or a term, condition or privilege of employment because of religion, race, color, national origin, age, sex, height, weight, or martial status.

Supreme Court, U.S.
FILED
MAY 16 2001
OFFICE OF THE CLERK

No. 00-1583

In The

Supreme Court of the United States

NANCY L. KAHN,

Petitioner,

v.

DEAN & FULKERSON, P.C., ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Whether the Court of Appeals properly affirmed the district court's opinion granting summary judgment on Petitioner's Equal Pay Act (29 U.S.C. § 206(d)(1)) and Michigan's Elliott Larsen Civil Rights Act (MCLA § 37.2101, *et seq.*) where both courts found that there was no legally sufficient evidentiary basis for a reasonable jury to find that Petitioner's gender was a factor or played a role in:

(1) the compensation system which Petitioner negotiated in her written employment agreement with the Respondent law firm;

(2) the decision not to make Petitioner a shareholder or modify her compensation system after one year of employment based upon dissatisfaction with her interaction with other members of the firm; and

(3) the distribution of a one-time extraordinary bonus to Petitioner and certain other attorneys of the firm.

The Petition contains several misstatements of law and fact and mischaracterizes the holdings of the lower courts. The Court of Appeals properly held that Defendant retained the burden of proof under the Equal Pay Act. Defendants met their burden by providing evidence that their actions and compensation system were based on "factors other than sex." Petitioner failed to present any evidence in response to Defendants' motion for summary judgment sufficient to raise any triable issue of fact as to Defendant's proofs. This is consistent with the statutory requirements and interpretations of all circuit courts of appeal.

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STATEMENT OF THE CASE

Petitioner originally filed a seven-count Complaint in the District Court alleging a violation of the Equal Pay Act, 29 U.S.C. § 206(d)(1) ("the EPA"), fraud and misrepresentation, conversion, conspiracy, breach of express and implied contract, unjust enrichment, tortious interference with a contract, and sex discrimination in violation of the Michigan Elliott-Larsen Civil Rights Act, MCL §§ 37.2202, *et seq.* ("the ELCRA") against her former employer, the law firm of Dean & Fulkerson, P.C., and twenty individual shareholders (sometimes referred to as "partners") in the firm. The Sixth Circuit affirmed the District Court's grant of summary judgment dismissing Petitioner's Complaint. Petitioner now seeks to overturn the rulings dismissing her claims for violation of the Equal Pay Act and gender discrimination.

There is no basis to grant the Petition where the record reveals that there was no evidence that Petitioner's gender was a factor or played a role in her compensation system or her treatment at the firm. Although the Petition engages in an after-the-fact analysis that she might have fared better under a different system, she ignores the fact that her compensation structure was based on a contract arrangement which she proposed, negotiated, and executed after full disclosure and analysis of the various risks associated with potential alternative systems. Petitioner also ignores the fact that a similarly situated male lateral hire worked under a similar compensation system.

Petitioner's employment agreement resulted from her admitted reluctance to accept a more financially risky formula, under which she could have made less money – and potentially have been out-of-pocket – had she not

produced. Petitioner accepted an agreement under which she did not have to bear the risk of having to pay her direct overhead or her pro-rata share of the firm's overhead, in return for a lower percentage compensation formula. The firm agreed to accept the risk of Petitioner's overhead at a point in time when neither party knew how the financial situation would turn out. At the time of her hire, the decision makers could not have known that her actual billings would exceed the firm's and her own expectations.

Petitioner's initial contact with the firm was her March 4, 1994, letter to the "Managing Partner" opening with the salutation, "Dear Sir/Madam." Petitioner's blind inquiry indicated that her law firm was breaking up in a mere three weeks and that she was on an "ambitious timetable" and needed to "relocate quickly." Petitioner indicated that in submitting this application she was "willing to consider . . . *a contract arrangement with some salary flexibility.*"

At the time, the law firm of Dean & Fulkerson was not looking for an environmental attorney and had no attorneys on staff who worked in this area. The firm had previously referred environmental work to outside firms.

Petitioner initially received a phone call from one of the shareholders/partners at the firm, Paul Mastrangel. During this conversation, Petitioner was told the firm would only be interested in an environmental specialist who was self-sufficient, who could deliver income-producing clients and a book of business in the range of $300,000 per year. Petitioner indicated she had nothing close to this amount and assumed the firm was not interested. Petitioner received a subsequent phone call from William Coon, who indicated the firm may be interested

in talking to Petitioner. Petitioner testified that she was surprised to hear from Coon after her phone call with Mastrangel since she assumed the firm would not be interested in someone with a book of business at her level.

On March 15, 1994, Petitioner met with shareholders William Coon and Janet Lanyon for over three hours. Coon and Lanyon provided "great detail" about the compensation system for shareholders at the firm. During this meeting they discussed "risks" inherent in the shareholder compensation system.

Shareholders at the firm are not paid any salary or bonus. All shareholders, and a limited number of other attorneys, enter into contracts with the firm under which they are compensated on a formula basis. The formula requires that the attorney assume the risk for all of his or her individual overhead (*i.e.*, secretary, office furniture, benefits, etc.) and a pro-rata share of the general overhead of the firm (*i.e.*, rent, utilities, shared personnel, etc.). This combined overhead is estimated to be between $70,000 and $75,000 annually. Once the overhead is paid, attorneys receive 82% of the remaining fees on matters that they have billed personally and 18% of the remaining fees billed by themselves or others on clients which they have originated. Prior to Petitioner's letter of inquiry, two female lateral hires, Janet Lanyon and Carol Vondale, accepted this contractual formula.

The firm also had other methods of compensation. Associates are paid a straight salary and bonus. At least one other lateral hire, William Coon, accepted a reduced percentage of billings in exchange for the firm's agreement to pay his overhead. Coon accepted this system because he was uncertain whether he could generate

enough business to pay his overhead share and still have an acceptable level of compensation.

Over several weeks, Petitioner had discussions with Coon and Lanyon in which they fully explored potential compensation systems. The shareholder formula was initially offered and Petitioner was interested. In a memorandum to the Board, Coon recommended that the firm pursue Petitioner and stated, "she is willing to take the economic risk inherent in the D & F system and seeks, at most, a 60-90 day deferral of expenses. . . . She is attracted to our system and would like to pursue the possibility of joining D & F."

Petitioner subsequently told Coon and Lanyon, who had offered her the formula, that she did not want it because "she was concerned she would not earn the income level she desired if she chose the formula." Petitioner articulated "reluctan[ce]," fearing she would be unable to generate enough business to pay for her individual and shared overhead at the firm. As noted, an individual attorney's overhead at the firm was between $70,000 and $75,000. During the negotiations, Petitioner informed Coon that at her prior firm, she had never billed more than $69,000 on clients which she had originated. Although Petitioner "guessed" she might be able to generate $100,000 in billings for the firm, she documented to Coon and Lanyon that this amount was "by no means assured."

Prior to signing her employment agreement, Petitioner did several side-by-side comparisons to analyze how she would be compensated under the standard formula versus a "less risky" formula where the firm paid her overhead. In this analysis, Petitioner saw that if she generated a significant amount of work, over $175,000

per year, she would earn more under the standard formula. Conversely, if Petitioner did not generate that amount of business, she would earn more under the "less risky" alternative formula where the firm assumed the risk and paid her overhead.

Petitioner admitted that she told the firm she was "reluctant" to accept the risk of having to pay the firm's overhead. Petitioner admitted that she told the firm she "was not willing to run the risk of having to write them checks" for her overhead at the beginning of her employment. Petitioner eventually told the firm "I did not want to owe them money – then [Coon] offered the one year package." Based on Petitioner's admitted expressions of reluctance, the firm reasonably believed that she preferred the lower risk alternative. Petitioner testified that when the proposal was made that was "less risky" financially to her, she agreed.

Petitioner's choice not to accept the formula was reflected in a contemporaneous memorandum regarding her potential hire from shareholder Paul Mastrangel to the Board of Directors: "After early discussions . . . that the candidate was 'willing to take the economic risk inherent in the D & F system. . . . ' The candidate articulated on March 24, 1994 a preference for a 'shared risk' position. . . . "

Petitioner was provided drafts of the employment agreement, negotiated for changes in the agreement, and the firm agreed to her demands. Petitioner never asked for changes in the compensation formula set forth in the agreement.

On May 6, 1994, Petitioner signed the agreement under which the firm paid all of her overhead. The agreement provided that it would continue for a 12-month period unless terminated earlier by the firm "at any time and for any reason." The agreement also contained a merger and integration clause providing that "this agreement supersedes any prior agreement between the parties" and "constitutes the entire agreement of the parties."

The agreement did not contain any terms which obligated the firm to place Petitioner on the shareholder formula at the expiration of the contract, which required the firm to vote on whether Petitioner would be made a shareholder after the contract expired or which stated that Petitioner's compensation formula was for any less than one year.

Petitioner produced no evidence that her employment agreement was anything other than an arms-length transaction, negotiated by her, with terms favorable to her based on her assessment of the potential risks attendant to other alternatives. According to Petitioner, she had other options. Petitioner testified that she was discussing employment opportunities with at least three other firms, one of which had made her an offer. Petitioner chose to sign the agreement with Dean & Fulkerson.

As a result of the employment agreement, all of the other shareholders at the firm assumed the risk of paying for Petitioner's overhead if she failed to generate sufficient business. The cost of Petitioner's overheard was to be paid out of the other shareholders' income as a direct cost to them. If Petitioner generated no more billings than she had in the past, she would be employed at a loss. In an April 7, 1994 memorandum to all shareholders from

the Professional Personnel Committee of the firm, it was noted that the "approach" which Petitioner agreed to "would result in a loss to the firm in the event that Ms. Kahn generates significantly less than estimated and the firm provides $50,000 or less in work within the next twelve months." The firm agreed to accept this risk to the benefit of the Petitioner.

The courts below found that Petitioner made an economic choice based on her analysis of known risks and an uncertain future. The lower courts found no evidence that gender played any role in the negotiations and discussions which led Petitioner to sign the May 4, 1996 agreement. Although now, well after the fact, Petitioner may regret the choices that she made, the unrebutted evidence shows that Petitioner made these choices with full disclosure and knowledge of the potential risks and advantages available to her. Petitioner could not, on this record, link her gender to any of these historical facts.

In March 1995, a special meeting was held by the Board of Directors during which Petitioner's employment status with the firm was raised since her contract was expiring soon. Both Janet Lanyon and Carol Vondale, female shareholders, expressed serious displeasure with Petitioner regarding her handling of a conflict issue. Both Lanyon and Vondale told the shareholders present that they did not want Petitioner as a fellow shareholder.

The conflict situation had originally arisen before Petitioner actually began working at the firm, when Lanyon had to obtain a waiver from a firm client of both Lanyon and Vondale because Petitioner was representing a plaintiff in a suit in which the client was a defendant. When Lanyon obtained the waiver, she was told by the client's corporate counsel, "don't let this happen again."

At the time of her hire, Petitioner was fully aware of the firm client's displeasure with providing the conflict waiver.

In late 1994 Plaintiff approached Lanyon again and requested that she obtain another waiver from the same client. At the time of the request, Petitioner had already sent a demand letter to the firm's client. Lanyon discussed the matter with other shareholders and determined that a violation of the rules of professional conduct had occurred as a result of the demand letter sent by Petitioner, but felt she had no choice at that point but to obtain another waiver. Vondale was displeased because, although she was also working on matters for the client, Petitioner did not initially speak to her about the conflict issue and later treated the matter cavalierly, telling Vondale, "well this isn't a big client for you anyway, is it."

On May 22, 1995, the Board convened at a regular meeting. Lanyon and Vondale again spoke in opposition to Petitioner being made a shareholder. The firm's bylaws required a super majority of 75% for the addition of a shareholder, or the hiring or termination of an attorney. In the discussion, it became apparent that there were enough "no" votes to defeat any vote to make Petitioner a shareholder. Rather than hold a vote which would have resulted in a denial of shareholder status to Petitioner, the Board resolved to continue Petitioner's employment agreement on the same terms and conditions as the original agreement. Some shareholders testified they did so to save Petitioner the embarrassment of being rejected as a shareholder or terminated from employment. Other shareholders said they hoped Petitioner would redeem herself and rehabilitate herself in the eyes of the other shareholders.

Petitioner continued to work in the second year of her employment under the same terms and conditions contained in the original May 6, 1994 agreement. On August 11, 1995, Petitioner was given a memorandum confirming earlier discussions that her employment would continue on the terms of the original agreement.

In December 1995, Petitioner announced to the shareholders that she would be leaving the firm. Petitioner was never told by anyone at the firm that she had to leave or resign. Petitioner testified that four male shareholders urged her to reconsider and stay. Petitioner did not resign until four months after her announcement, on March 15, 1996. The following Monday, March 17, 1996, Petitioner accepted employment with a new law firm as a non-equity shareholder where she earned an equivalent or greater level of compensation despite working on a reduced basis. Petitioner lost no clients or business as a result of her relocation. Shareholders at Dean & Fulkerson allowed her to take clients and files with her and continued to refer her work.

REASONS FOR DENYING THE PETITION

I. THE CIRCUIT COURT DECISION DOES NOT CONFLICT WITH ANY RELEVANT DECISION OF THIS COURT.

Petitioner argues that the Circuit Court refused to apply "every one of the principles and holdings" in this Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000). The argument is based on misunderstanding of *Reeves* and distortion of the Circuit Court opinion.

Reeves involved a claim of age discrimination in employment in violation of the Age Discrimination in Employment Act ("ADEA").[1] The jury had returned a verdict in favor of the plaintiff, and the district court denied the defendant employer's motion for judgment as a matter of law under Fed.R.Civ.P. 50(a). The Fifth Circuit reversed, holding that, under the *McDonnell Douglas*[2] formulation, where a defendant has articulated a legitimate nondiscriminatory reason for the challenged employment decision in response to the plaintiff's *prima facie* case, the plaintiff must present sufficient evidence directly showing that age was a motivating factor in the decision in order to create a triable issue for the jury.

This Court reversed, holding that "a plaintiff's *prima facie* case, combined with sufficient evidence to find that the employer's asserted justification is false, *may* permit the trier of fact to conclude that the employer unlawfully discriminated." *Reeves*, 530 U.S. at 148 (emph. added).

In that the *McDonnell Douglas* formulation was developed for cases brought under Title VII of the Civil Rights Act of 1964[3], there is no question that the holding in *Reeves* applies to sex discrimination claims under Title VII. It is unclear, however, whether *Reeves* has any application to claims under the EPA.

Under the *McDonnell Douglas* formulation, a Title VII plaintiff establishes a *prima facie* case of sex discrimination by showing: 1) membership in a protected class; 2)

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[1] 29 U.S.C. §§ 621, *et seq.*

[2] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

[3] 42 U.S.C. §§ 2000e, *et seq.*

that she was subjected to an adverse employment decision; 3) that she was qualified for the position; and 4) that similarly situated males were treated more favorably. Once a *prima facie* case has been established, the burden shifts to the defendant to produce evidence of a legitimate nondiscriminatory reason for the challenged employment decision. *Texas Dept. of Public Affairs v. Burdine*, 450 U.S. 248, 254, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). The burden is one of *production* only, and not persuasion. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 509, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993).

If the defendant meets its burden of production, the plaintiff is then afforded the "opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Burdine*, 450 U.S. at 253. Notwithstanding the shifting evidentiary burden, however, the ultimate burden of proving *intentional* discrimination by the defendant always remains with the plaintiff. *Id.*

The evidentiary and proof burdens are substantially different for an EPA claim. First, the plaintiff establishes a *prima facie* case by demonstrating: 1) that different wages were paid to employees of the opposite sex; 2) that the employees did equal work which required equal skill, effort and responsibilities; and 3) that the employees had similar work conditions. *Corning Glass Works v. Brennan*, 417 U.S. 188, 195, 94 S.Ct. 2223, 41 L.Ed.2d 1 (1974).

If the Plaintiff establishes a *prima facie* case, the defendant must then establish that the wage differential is justified by one of the EPA's four exceptions, *i.e.*, that it is based on: 1) a seniority system; 2) a merit system; 3) a system which measures earnings by quantity or quality of

production; or 4) any other factor other than sex. *Corning Glass Works*, 417 U.S. at 196; 29 U.S.C. § 206(d)(1). Unlike the *McDonnell Douglas* formulation, the defendant's burden is not merely to articulate a reason. The exceptions are affirmative defenses, on which an employer bears the burden of *proof*. *Id.* Because the EPA defendant does not prevail by merely *articulating* its reason for the pay disparity, the final evidentiary burden shifting under *McDonnell Douglas* is not necessary. The standard of proof for demonstrating pretext enunciated by this Court in *Reeves*, therefore, is not directly applicable to a claim under the EPA.

This is not to say that evidence that an employer's proffered reason for a pay disparity is a mere pretext cannot be relevant in an EPA case, however. Such evidence would certainly bear on the issue whether the defendant has met its burden of establishing one of the affirmative defenses. Moreover, in the context of a motion for summary judgment by the employer, the presence or absence of evidence that the reason for a challenged pay disparity advanced by the defendant was not the true reason could bear on the issue whether the plaintiff, as the non-moving party, had met her burden under Fed.R.Civ.P. 56(c) to "set forth facts showing that there is a genuine issue for trial."

In arguing that the courts below imposed a burden upon her which is not permitted under *Reeves*, Petitioner ignores the Rule 56 context for the district court's decision and the Sixth Circuit's affirmance. *Reeves* neither holds nor implies that summary judgment may never be granted in a discrimination case, whether under the ADEA, Title VII or the EPA. To the contrary, this Court stated:

> Certainly there will be instances where, although a plaintiff has established a *prima facie* case and set forth sufficient evidence to reject the defendant's explanation, no rational fact-finder could conclude that the action was discriminatory.

Reeves, 530 U.S. at 148.

Nor does *Reeves* purport to relieve the nonmoving party from her evidentiary burden of establishing the existence of a genuine issue of material fact in response to a properly supported motion under Rule 56, in order to permit submission of the case to a jury. "[W]e have reiterated that trial courts should not 'treat discrimination differently from other ultimate questions of fact.' " *Id.*, quoting *St. Mary's Honor Center*, 509 U.S. at 716.

Here the District Court found that Respondents had met their initial Rule 56 burden of establishing the absence of a genuine issue of material fact regarding the affirmative defense that Petitioner's pay differential was based on a factor other than sex. The burden then rested upon Petitioner to establish the existence of a genuine factual issue regarding that defense, whether by showing it to be a mere pretext or otherwise. The District Court found, and the Circuit Court agreed, that Petitioner had failed to come forward with evidence sufficient to call Respondents' reason into question.

As this Court recognized in *Reeves*, judgment as a matter of law should be granted under Fed.R.Civ.P. 50 when "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." *Reeves*, 530 U.S. at 149. The standard for granting summary judgment under Rule 56 is the same. *Id.*, 530 U.S. at 150. The Circuit

Court's opinion affirming the grant of summary disposition to Respondent placed no burden upon Petitioner other than that required under Rule 56, and is in no way in conflict with this Court's opinion in *Reeves*.

Petitioner offers six "examples" of purported rejection of *Reeves* by the Circuit Court, each of which is based on a distortion of the opinion below. Analysis of these "examples" in comparison with the actual language of the opinion demonstrates the poverty of Petitioner's argument.

A. THE CIRCUIT COURT DID NOT REQUIRE DIRECT EVIDENCE OF PRETEXT.

First, the Circuit Court did not require that Petitioner produce "direct evidence that the Respondents did not 'honestly' believe the defenses to which they were testifying." [Petition at 9-10]. To the contrary, the portion of the opinion to which Petitioner cites states:

> The record, however, contains *no evidence to suggest* that Lanyon and Vondale did not honestly oppose plaintiff becoming a shareholder because of her handling of the waiver issue, or that their vocal opposition did not motivate others to vote with them. It was because of their vocal opposition that plaintiff faced unemployment as well as rejection as a shareholder.

[Ct. of App. Op.; App. A at 18a (emph. added)[4]].

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[4] Citations to the Appendix will refer to the Appendix submitted by Petitioner.

In *Reeves*, this Court held that a plaintiff's *prima facie* case, "*combined* with sufficient evidence to find that the employer's asserted justification is false," can create a triable issue regarding unlawful discrimination. *Reeves*, 530 U.S. at 128 (emph. added). Even the dissent below recognized that an EPA plaintiff bears the burden of producing evidence of falsity of the defendant's reason "where a reasonable jury viewing the defendant's evidence could only find for the defendant. . . . " [Ct. of App. Op.; App. A at 25a, quoting from *Buntin v. Breathitt County Bd. of Educ.*, 134 F.3d 796, 800 (6th Cir. 1998)].

In relying on the absence of evidence calling into question the validity of Respondent's reasons for Petitioner's salary structure, the Circuit Court did not depart from any holding in *Reeves*.

B. THE CIRCUIT COURT DID NOT REFUSE TO CONSIDER INFERENCES FROM PETITIONER'S PRIMA FACIE CASE.

Petitioner claims that the Circuit Court "refused to consider the inferences that could be drawn from the Plaintiff's *prima facie* case." *Reeves* did not, of course, address what inferences might be drawn from the *prima facie* showing required under the EPA, nor does Petitioner identify what those inferences might be.[5] More to the point, *Reeves* did not hold that a *prima facie* showing

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[5] Further, Petitioner offers no legal authority for the proposition that a showing of a pay disparity – of any magnitude – between a female and male employee for equal work on jobs requiring equal skill, effort and responsibility (the elements of a *prima facie* case under the EPA) raises any inference that would tend to negate a defendant's affirmative defense that the disparity was based on a factor other than sex.

alone, without evidence of pretext, can be sufficient to create a triable issue after the defendant has met its evidentiary burden of production under *McDonnell Douglas*.

As *Reeves* reiterated, the presumption of discrimination created by a *prima facie* showing in a Title VII or ADEA case "drops out of the picture once the defendant meets its burden of production." *Reeves*, 530 U.S. at 143. In requiring that Petitioner come forward with evidence bearing on the truth of her employer's demonstrated reason for the pay disparity, beyond the fact of that disparity, the Circuit Court opinion does not conflict with any decision of this Court.

C. THE CIRCUIT COURT DID NOT HOLD THAT DISCRIMINATION COULD NOT BE INFERRED FROM A "FALSE" REASON.

The Circuit Court did not find that discrimination could not be inferred from a defendant's assertion of a false reason for the wage disparity, as Petitioner asserts. Rather, the court determined that Petitioner had failed to produce evidence sufficient to raise a triable issue regarding whether Respondents' reasons were false or whether her gender was a factor in any of the alleged actions. Notwithstanding Petitioner's characterization, her argument is simply that the Circuit Court erred in assessing the evidence of record, and not that it relied on a holding in conflict with *Reeves*.

D. THE CIRCUIT COURT DID NOT REFUSE TO CONSIDER ANY ALLEGED "DISCRIMINATORY" STATEMENTS.

Again, Petitioner mischaracterizes her disagreement with the Sixth Circuit's assessment of the evidence of record as a legal departure from this Court's holdings. The Circuit Court's opinion directly addressed the statements alleged by Petitioner and found that they could not support an inference of discrimination: "These comments could not lead a rational trier of fact to conclude that the alternative [compensation] formula was first offered to plaintiff and then extended for a second year because of her sex." [Ct. of App. Op.; App. A at 19a]. This determination in no way conflicts with this Court's holdings in *Reeves*.

E. THE CIRCUIT COURT MADE NO CREDIBILITY DETERMINATIONS.

In the passage from its opinion cited by Petitioner, the Circuit Court did not *resolve* an issue of credibility: it found that "there *was* no genuine issue of material fact on the credibility of defendants' explanation for the decision not to take a vote on her shareholder status." [Ct. of App. Op.; App. A at 22a (emph. added)]. As with any other fact issue, an issue regarding credibility must be established by the non-moving party in order to defeat a summary judgment motion.[6] In finding that there was no credibility

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[6] *Cf. Crawford-El v. Britton*, 523 U.S. 574, 600, 118 S.Ct. 1584, 140 L.Ed.2d 759 (1998) ("if the defendant-official has made a properly supported motion, the plaintiff may not respond simply with general attacks upon the defendant's credibility").

issue, the Circuit Court opinion does not conflict with *Reeves* or any other opinion of this Court.

F. THE CIRCUIT COURT DID NOT IMPERMISSIBLY CONSIDER EVIDENCE FAVORABLE TO RESPONDENTS THAT A JURY IS NOT REQUIRED TO ACCEPT.

In *Reeves*, this Court reiterated the principle that, in reviewing the record as a whole in the context of a Rule 50 motion, a court must "disregard all evidence favorable to the moving party that the jury is not required to believe." *Reeves*, 530 U.S. at 151, citing Wright & Miller, Federal Practice and Procedure § 2529 (2d ed. 1995). The opinion went on to explain (also citing Wright & Miller) that a court should also "give credence" to "evidence supporting the moving party that is uncontradicted and unimpeached. . . . " *Id.*[7]

Petitioner seizes upon this statement to claim that the Circuit Court opinion conflicts with *Reeves* in finding that there was no evidence to support her claim that she was never offered the standard formula for compensation. The portion of the opinion below of which Petitioner complains reads: "Despite plaintiff's claim that she was never offered the standard formula, the evidence shows that the firm's standard formula was explained to plaintiff and that Coon was prepared to recommend hiring her under the standard formula." [Ct. of App. Op.; App. A at 16a].

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[7] As this Court has previously recognized, uncontradicted, unimpeached evidence from an "interested" witness need not be disregarded where there is no indication in the record of a lack of candor. *Chesapeake & Ohio Ry. Co. v. Martin*, 283 U.S. 209, 51 S.Ct. 453, 75 L.Ed. 983 (1931).

Petitioner has not pointed to any evidence in the record which calls this finding into question, or raises any issue regarding a lack of candor by the witnesses upon whose testimony the District Court and Court of Appeals relied. Accordingly, she has not demonstrated any conflict between *Reeves* and the decisions below.

II. THE SIXTH CIRCUIT OPINION BELOW DOES NOT CONFLICT WITH DECISIONS OF ANY OTHER CIRCUIT ON ANY IMPORTANT MATTER.

Petitioner posits a "significant variation" among Circuit Courts regarding the burdens of proof in EPA cases as a ground for acceptance of her petition. In fact, each of the Circuits has squarely held that, once the plaintiff meets her initial burden of establishing a *prima facie* case, the burden of *proof* shifts to the defendant to establish one of the four statutory exceptions as an affirmative defense.[8]

In reality, Petitioner is arguing that summary judgment under Rule 56 is never proper in a case under the EPA when the plaintiff has established her *prima facie* case. She has not, however, cited a single case where a Circuit Court has so held. In fact, every Circuit which has addressed the issue has held that summary disposition is

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[8] *See, e.g., McMillan v. Massachusetts S.P.C.A.*, 140 F.3d 288, 298 (1st Cir. 1998); *Stanziale v. Jargowsky*, 200 F.3d 101, 107 (3d Cir. 2000); *Brinkley v. Harbour Recreation Club*, 180 F.3d 598, 613-14 (4th Cir. 1999); *Peters v. City of Shreveport*, 818 F.2d 1148, 1155 (5th Cir. 1987); *Fyfe v. City of Fort Wayne*, 241 F.3d 597, 600 (7th Cir. 2001); *Hutchins v. International Brotherhood of Teamsters*, 177 F.3d 1076, 1081 (8th Cir. 1999); *Stanley v. University of Southern California*, 178 F.3d 1069, 1075 (9th Cir. 1999); *Goodrich v. International Brotherhood of Electrical Workers, AFL-CIO*, 815 F.2d 1519, 1523-24 (D.C. Cir. 1987).

properly granted where, based on the record evidence, there is no genuine issue of material fact regarding the employer's affirmative defense, and no reasonable jury could find that the challenged pay differential was based on sex.

In *Wollenburg v. Comtech Manufacturing Co.*, 201 F.3d 973 (7th Cir. 2000), for instance, the district court granted summary to disposition to the employer because, although the plaintiff had established a *prima facie* case, the employer had demonstrated that she was paid less than her comparators because of their greater experience. The Seventh Circuit affirmed, finding that experience was a "factor other than sex," the defendant had demonstrated that the comparators had more supervisory experience, and "there was no genuine issue of material fact over the validity" of the experience differential being the reason for the pay disparity. *Wollenburg*, 201 F.3d at 976.

Similarly, in *Stanley v. University of California*, 178 F.3d 1069 (9th Cir. 1999), the court found that the plaintiff had raised a genuine issue regarding her *prima facie* case, but that the defendant had offered evidence which "convincingly support[ed]" its claim that the challenged pay differential was based on a factor other than sex. In the context of a summary judgment motion, the burden then fell on the plaintiff to demonstrate the existence of a triable issue regarding the affirmative defense.

> Where the defendant demonstrates that a pay differential was based on a factor other than sex, the employee may prevail by showing that the employer's proffered nondiscriminatory reason is a "pretext for discrimination." [Citation omitted.] On this appeal, [plaintiff] bears the burden

> of demonstrating a material fact regarding pretext in order to survive summary judgment.

Stanley, 178 F.3d at 1076.

The Fourth Circuit, in *Brinkley v. Harbor Recreation Club*, 180 F.3d 598 (4th Cir. 1999), has also upheld the award of summary judgment on the basis that the employer had established the factor "other than sex" defense. The court held: "When the defendant produces such evidence supporting its affirmative defense, the burden of production shifts back to the plaintiff who 'must come forward with "specific facts showing there is a genuine issue for trial." ' *White v. Rockingham Radiologists, Ltd.*, 820 F2d 98, 101 (4th Cir., 1987) (quoting Fed.R.Civ.P. 56(e))." *Brinkley*, 180 F.3d at 614.[9] Rejecting the plaintiff's argument that establishment of a *prima facie* case was itself sufficient to create a triable issue, the Fourth Circuit upheld the grant of summary judgment, stating: " . . . evidence that merely points to the existence of a pay differential does nothing to further the plaintiff's cause. To survive summary judgment, the plaintiff must produce evidence, direct or circumstantial, that controverts the defendant's evidence that a legitimate ground justifies the pay difference." 180 F.3d at 615, n. 13.

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[9] The First, Third and D.C. Circuits have reversed grants of summary judgment on the ground that the plaintiff *had* demonstrated the existence of a genuine issue, at least implicitly recognizing that judgment under Rule 56 would be proper in the appropriate case. *See, Byrd v. Ronayne*, 61 F.3d 1026 (1st Cir. 1995); *Stanziale v. Jargowski*, 200 F.3d 101 (3rd Cir. 2000); *Goodrich v. Int'l Brotherhood of Electrical Workers*, 815 F.2d 1519 (D.C. Cir. 1987).

The Second, Eighth and Eleventh Circuits have also upheld summary judgment where the plaintiff failed to establish a genuine issue regarding the employer's affirmative defense. *See, Belfi v. Prendergast,* 191 F.3d 129 (2nd Cir. 1999); *Hutchins v. Int'l Brotherhood of Teamsters,* 177 F.3d 1976 (8th Cir. 1999); *Irby v. Bittick,* 44 F.3d 949, 954 (11th Cir. 1995).

There is no conflict among the Circuit Courts regarding whether summary judgment may be granted where the defendant has established one of the affirmative defenses under the EPA and the plaintiff has failed to come forward with evidence sufficient to raise a triable issue regarding that defense. The "conflict" cited by Petitioner among the Second, Sixth, Tenth and Eleventh Circuits, insofar as it can be seen as a conflict at all, is purely semantic.

In a footnote in *Buntin v. Breathitt County Bd. of Educ.,* 134 F.2d 796 (6th Cir. 1998), the Sixth Circuit criticized the Eleventh Circuit's statement in *Irby v. Bittick, supra,* that once an EPA defendant meets the burden of establishing its affirmative defense, "the plaintiff must rebut the explanation by showing with affirmative evidence that it is pretextual or offered as a post-event justification for a gender-based differential." The Sixth Circuit properly noted, however, that an EPA plaintiff "bears the burden of producing evidence of pretext . . . where a reasonable jury viewing the defendant's evidence could find only for the defendant. . . . " *Buntin,* 134 F.2d at 800, n. 7.

The language which the Sixth Circuit quoted from *Irby* is broader than its true holding. The Eleventh Circuit correctly held that an EPA defendant bears the burden of proving the affirmative defense. The Court stated that a party moving for summary judgment must demonstrate

that "on all of the essential elements of its case on which it bears the burden of proof at trial, no reasonable jury could find for the non-moving party." *Irby*, 44 F.3d at 953. The Court then noted that, if that burden is met, the non-moving party must "come forward with significant, probative evidence demonstrating the existence of a triable issue of fact." *Id.* Under the circumstances of the particular case, the Eleventh Circuit was correct in stating that, where an EPA defendant has met its burden under Rule 56, the plaintiff is required to come forward with affirmative evidence from which a jury could find that the defendant's reason was pretextual.

The standards applied by the Second Circuit are consistent with those applied by the other circuits and by this Court. Contrary to Petitioner's characterization, *Aldrich v. Randolph Central School District*, 963 F.2d 520 (2nd Cir. 1992), did not hold that every EPA plaintiff must only show that she is doing the same work as male employees for lower pay in order to survive a summary disposition motion.

In *Aldrich*, the employer's affirmative defense was that the pay differential was based on a job classification system. The Second Circuit reversed the trial court's order granting summary judgment to the employer, holding that there was a genuine issue of fact regarding the affirmative defense. Demonstrating the lack of any conflict with the Sixth and Eleventh Circuits, however, the Second Circuit went on to state: "Additionally, we note *the plaintiff may counter the defendant's affirmative defense by offering evidence showing that the reasons sought to be proved are a pretext* for sex discrimination. *Aldrich*, 963 F.2d at 526 (emph. added).

Ryduchowski v. Port Authority, 203 F.3d 135 (2nd Cir. 2000), does not represent a "subsequent shifting" of burdens, as argued by Petitioner; it demonstrates the consistency of the Second Circuit's correct allocation of the burden of proof in EPA cases. The Second Circuit recognized that, once a *prima facie* case had been established, the defendant bore the burden of proving one of the statutory affirmative defenses.[10] Its holding was simply that there had been sufficient evidence at trial to support a jury finding that the challenged pay differential was not based on a valid or consistently applied merit system.

Finally, Petitioner mischaracterizes the holding in *Tidwell v. Fort Howard Corporation*, 989 F.2d 406 (10th Cir. 1993), in attempting to manufacture a split among the circuits. *Tidwell* was an appeal by the plaintiff from a "somewhat unusual" jury verdict that the defendant committed a "nonwillful" violation of the EPA, and the district court's finding that she had failed to demonstrate intentional discrimination in support of her Title VII claim. Thus, in stating the defendant's burden after a *prima facie* case has been established under the EPA, the Tenth Circuit opinion is couched in language appropriate to the specific trial setting below:

> If a *prima facie* case is so established under the EPA the *defendant* must undertake the burden *of persuading* the jury that there existed reasons for the wage disparity which are described in the Equal Pay Act [citation omitted]. ***

---

[10] The court in *Ryduchowski* also recognized the principle that evidence of pretext may be used by a plaintiff to counter a defendant's affirmative defense, quoting directly the language from *Aldrich* cited above.

> If the defendant fails to convince the jury with its evidence of one or more of the "affirmative defenses" listed above the plaintiff will prevail on her *prima facie* case.

Tidwell, 989 F.2d at 409.

To read the quoted passage as a proscription against summary judgment in all EPA cases where the plaintiff has established a *prima facie* case is pure sophistry. The court in *Tidwell* did not purport to address the parties' burdens under Rule 56, and neither the language nor the facts of the case can support the interpretation urged by Petitioner.

There is no conflict among the Circuit Courts which would bear in any manner on the decision of the Sixth Circuit from which Petitioner seeks review, and this Court should deny her Petition.

III. THE SIXTH CIRCUIT CORRECTLY APPLIED THE PROPER RULE OF LAW TO THE RECORD EVIDENCE IN AFFIRMING THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT.

Since this case presents no conflict with opinions of this Court or of the other Circuit Courts, the Petition can only be seen as a request that this Court review the determination by the District Court, affirmed by the Circuit Court, that Petitioner failed to raise a triable issue regarding whether Respondent's nondiscriminatory reasons for her compensation structure were pretextual. The actual error claimed by Petitioner, therefore, is misapplication of established rules governing summary judgment by the courts below, an issue which only "rarely" justifies certiorari. Supreme Court Rule 10.

Even were this Court otherwise disposed to review such issues, however, the record reveals no error in the grant of summary judgment to Respondent. Contrary to Petitioner's assertions, she did not present evidence sufficient to raise a genuine issue regarding whether Respondent's demonstrated reasons for Petitioner's compensation system and treatment at the firm were false or pretextual.

Petitioner seems to indicate that because the minutes of the May 22, 1995 Board Meeting do not articulate any criticisms of Petitioner, the reasons for denying her the shareholder status and the formula must be false. Petitioner cites no legal authority for this position, however. Moreover, Petitioner never disputed the issues which arose between her and two other female shareholders, Janet Lanyon and Carol Vondale, or that Lanyon and Vondale were highly upset at Petitioner's conduct with regard to a conflict of interest and her refusal to address it through established firm procedures. Further, Petitioner never disputed the fact that as a result of the super majority requirements, and the proxies held by at least one other member of the Board, the decision was made not to hold the vote to elevate Petitioner to shareholder status.

Likewise, Petitioner produced no evidence to show that the decision to continue her employment agreement on the same terms and conditions for a second year was any way linked to her gender. Respondents demonstrated that the decision to deny shareholder status was based on the female shareholders' dissatisfaction with her conduct. Notwithstanding that dissatisfaction, Petitioner's employment was not terminated; her contract was extended for an additional year. The undisputed evidence

shows no link between Respondents' actions and Petitioner's gender, especially in light of the abundant evidence of non-discriminatory practices at the firm.

Petitioner's claim that Respondents did not reference their asserted defense in answers to interrogatories overlooks the fact that these interrogatories were primarily concerned with identification of the individuals that complained about her. Respondents clearly provided the identification, by name, of the shareholders who complained about Petitioner and the dates of such complaints. With regard to the conflict between Lanyon, Vondale and Petitioner, the deposition testimony of Petitioner and all other witnesses was consistent. There were no factual discrepancies regarding the event or Lanyon or Vondale's level of dissatisfaction with Petitioner's conduct.

Finally, Petitioner again points to alleged statements by Coon and Mastrangel, claiming that they somehow provide evidence that her compensation system was based on her sex. Petitioner's attempts are misguided for several reasons. The comments, if made, were unquestionably gender neutral.[11] As the Circuit Court properly held: "[t]hese comments could not lead a rational trier of fact to conclude that the alternative formula was first

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[11] The fact that Coon commented that Vondale did not need to work because her spouse earned a great deal of money is a comment that could be applied equally to males as well as females. In fact, Coon was just echoing what Vondale herself had said. Similarly, Mastrangel's comment was a reiteration of Petitioner's own prehire projection that she would bill only 1500 hours per year due to "preexisting obligations." His comment clearly related to an objection to her expressed billing potential, equally applicable to a male or a female.

offered to Petitioner and then extended for a second year because of her sex." [Ct. Of App. Op.; App. A at 19a].

Moreover, it was Coon who initially recommended Petitioner's hire to the Board of Directors and proposed that she be compensated on the standard formula, which raises an inference of the *lack* of discriminatory animus. *See Buhrmaster v. Overnite Transport Co.*, 61 F.3d 461, 463 (6th Cir. 1995); *Proud v. Stone*, 945 F.2d 796 (4th Cir. 1991); *Lowe v. J.B. Hunt Transport, Inc.*, 963 F.2d 173 (8th Cir. 1992). Coon was not even present at the May 1995 Board Meeting when Petitioner was rejected as a shareholder and the decision was made to continue her employment agreement for an additional year.

Petitioner failed to show that these comments are "direct" evidence of discrimination. She did not show that either of the comments was made at the time of the decision she complains of, by decision makers, or in an unambiguous manner which could support an inference that her gender was a factor in the employment decisions.[12]

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[12] *See, e.g., Gagne v. Northwestern Nat'l Ins. Co.*, 881 F.2d 309, 314 (6th Cir. 1989) (isolated and ambiguous statements are "too abstract, in addition to being irrelevant and prejudicial to support a finding of . . . discrimination."); *Kennedy v. Schoenberg, Fisher and Newman, Ltd.*, 140 F.3d 716 (7th Cir.), *cert. denied*, 525 U.S. 870, 119 S.Ct. 167, 142 L.Ed.2d 136 (1998) (casual statement in conversation unrelated to issues leading to discharge not direct evidence of discriminatory intent); *Fernandes v. Costa Brothers Masonry*, 199 F.3d 572, 583 (1st Cir. 1999) ("In our judgment, inherently ambiguous statements, without more, cannot supply the strong evidence that . . . courts rightfully demand as a prerequisite to mixed-motive analysis.")

The EPA's fourth affirmative defense – any other factor other than sex – "is a broad 'catch-all' exception [that] embraces an almost limitless number of factors, so long as they do not involve sex." *Dey v. Colt Const. & Devel. Co.*, 28 F.3d 1446, 1462 (7th Cir. 1994), quoting from *Fallon v. State of Illinois*, 882 F.2d 1206, 1211 (7th Cir. 1989). The Circuit Court properly determined that Petitioner had failed to raise a genuine issue of fact regarding whether Respondents' established affirmative defense was false or pretextual, and therefore correctly held that summary judgment was properly granted to Respondents. Since the affirmative defense also constitutes a legitimate nondiscriminatory reason for the pay disparity, the Circuit Court also properly upheld summary judgment on Petitioner's claim under the ELCRA.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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(3)

Supreme Court, U.S.
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No. 00-1583

In the Supreme Court of the United States

NANCY L. KAHN,
Petitioner,

v.

DEAN & FULKERSON, P.C., et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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I. INTRODUCTION AND SUMMARY

There are at least three major components to the Respondents' Brief. First, they argue that the decision below does not conflict with any decisions by this Court. Central to this argument is Respondents' assertion that it is "unclear" whether the evidentiary principles for proving pretext outlined by this Court in Reeves v. Sanderson, 520 U.S. 133, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000) "have any applicability to claims under the Equal Pay Act." (Respondents' Brief, p.10.) Since both the Reeves decision and the subject case turned the issue of whether there was sufficient evidence of pretext to go to the jury, Respondents' continued arguments that this Court's holdings in Reeves may be inapplicable serves to further demonstrate the need for this Court to clarify the issue.

Respondents' second major argument is that there is no circuit split and that to the extent the circuits themselves have specifically acknowledged that split, the differential in the application of the burden of proof is "pure semantics." Ironically, Respondents cite additional cases from various circuits that, upon actual review, further demonstrate the gross inconsistencies between the circuits in both the description and the application of the burdens of proof in Equal Pay Act cases.

The third major component of Respondents' brief is a very lengthy rendition of the testimony of one of the Respondents, taken in the light most favorable to them. The story contained in Respondents' Brief conflicts with their own contemporaneous records, with the testimony of other individual Respondents, and with the testimony of the Petitioner. (See Affidavits of Petitioner filed with district court on 8/17/98 and 7/6/98, Appendices J & K, 87a- 97a, of

this Reply).

In order for a fact finder to believe Respondents' story, it would be necessary for the fact finder to accept the claim that a series of misunderstandings and coincidences caused the Respondents' story to be at odds with their own records on virtually every occasion, and caused the Respondents to disregard their established compensation system on two different occasions, for two completely different reasons, once they were confronted with the first female attorney who was about to become highly compensated under the system.

The point here is not that the Court below made a bad decision, rather, the erroneous application of the burden of proof in Equal Pay cases, combined with the refusal to apply this Court's rules regarding proof of pretext, is causing various circuit and district courts to accept the defendant employers' inevitable story regarding their nondiscriminatory motivation at face value. This places an impossible burden on plaintiffs.

In addition to evaluating the three major components of Respondents' arguments listed above, it is important to note, as a preliminary matter, that Respondents' own brief confirms that their asserted reasons for the pay differential were completely inconsistent with their own compensation policy, and therefore fail to qualify as an affirmative defense as a matter of law.

Respondents admit that they refused to provide equal pay after Petitioner's first year of employment based on what they now characterize as "dissatisfaction with her interaction with other members of the firm." (Respondents' Brief, p. i, ¶ 2 of Questions Presented.) Since the Respondents'

compensation system is admittedly based entirely on financial productivity, and since no male employee has ever has his compensation based on matters involving "dissatisfaction with interaction with other members of the firm," the Respondent's brief confirms that they have not met their burden of proving that the pay differential was based on a "bona fide" evaluation or classification program that the Respondents' actually employed. Therefore summary disposition should have been entered against them in accordance with the holding of this Court in Corning Glass Works v. Brennan, 417 U.S. 188, 94 S.Ct. 2223, 41 L.Ed 2d 1 (1974).

II. THE REFUSAL OF RESPONDENTS AND THE SIXTH CIRCUIT TO RECOGNIZE THE APPLICABILITY OF REEVES V. SANDERSON.

Respondents continue their refusal to acknowledge that the evidentiary principles that can be used to establish pretext, as announced by this Court's decision in Reeves v. Sanderson, have any applicability to in Equal Pay Act cases.

> "It is unclear, however, whether Reeves has any applicability to claims under the EPA." (Respondent's Brief, p. 10.)

Respondent's refusal to acknowledge the applicability of the evidentiary principles announced in Reeves was apparently accepted by the Court of Appeals given the Court's failure to address the holdings in Reeves.[1]

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[1] In the courts below the Respondents took this argument one step farther , asserting that the court may not even consider whether the asserted defense might be a pretext. Respondents

Regardless of the burden of proof analysis that is applied, it would seem elementary that once the issue before the court involves whether there is evidence to support a jury finding of pretext, the evidentiary principles for proving pretext announced by this Court in Reeves must be considered.

III. PLAINTIFF USED A SUBJECTIVE "STATE OF MIND" DEFENSE, IN COMBINATION WITH A DEFENSE MOTION FOR SUMMARY DISPOSITION, TO DEMAND DIRECT EVIDENCE OF THE EMPLOYER'S DISCRIMINATORY STATE OF MIND

Respondents' strategy in this case was simple. They used a subjective defense theory that hinged on the Respondents' state of mind (i.e., that Petitioner was denied equal pay because two of them "were dissatisfied with Petitioner's interaction with other members of the firm"). (Respondent's Brief, p. i, ¶ 2.) They then combined this defense with a Motion for Summary Disposition, arguing that the Plaintiff could not provide sufficient evidence to disprove the Defendant's subjective, "state of mind" defense.

Respondents argue that once the employer defendant has moved for summary disposition based on defense testimony that their motive for the wage differential was nondiscriminatory, the employee plaintiff has the burden of producing additional evidence "bearing on the truth of her

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argued: "Thus, as the District Court properly recognized, the issue of "pretext" is not involved in an EPA case at the summary judgment level." (Emphasis in original.) (Respondents' Sixth Circuit Brief on Appeal, pp. 35-36.)

employer's" stated motivation in order to survive summary disposition. (Respondents' Brief, p. 16.) This is the equivalent of requiring "direct" evidence of discrimination and is contrary to the holding in Reeves.

Respondents attempt to argue that Petitioner's approach would preclude summary disposition for defendants in all Equal Pay cases. That grossly overstates the argument. When an EPA Defendant asserts an objective defense that is consistent with its bona fide evaluation system, summary disposition might be possible after an analysis of the type outlined by this Court in Reeves. However, when, as here, the employer asserts a purely subjective, "state of mind" defense, and then calls on the plaintiff to rebut it, the defendant should rarely be entitled to summary disposition because in most cases a jury would not be required to accept a subjective, "state of mind" defense based on this Court's holding in Reeves.

IV. RESPONDENTS SEEK TO ERASE THE STATUTORY BURDEN OF PROOF PLACED ON EQUAL PAY DEFENDANTS ONCE A PRIMA FACIE CASE HAS BEEN MADE.

The clarity of the Respondents' argument is revealed on p. 15, of their Brief where they state the following:

> "Petitioner offers no legal authority for the proposition that a showing of a pay disparity - of any magnitude - between a female and a male employee for equal work on jobs requiring equal skill effort and responsibility (the elements of a *prima facie* case under the EPA) raises any inference that would tend to negate a defendant's affirmative defense that

the disparity was based on a factor other than sex." Respondents' Brief, p. 15, Note 5.

This argument is **directly** in opposition to this Court's holding in Reeves which states:

> ". . . (T)he trier of fact may still consider the evidence establishing the plaintiff's prima facie case "and inferences drawn therefrom . . . on the issue of whether the defendant's explanation is pretextual." Reeves v. Sanderson, supra, 120 U.S. at 2106.[2]

V. A DIRECTLY ARTICULATED SPLIT BETWEEN THE CIRCUITS ON IMPORTANT BURDEN OF PROOF ISSUES IS NOT "MERE SEMANTICS."

The articulated Circuit split involves whether the burden shifts back to plaintiff to prove pretext once the defendant has offered evidence of one of the four affirmative defenses. Respondents urge the Court to disregard the conflict as "purely semantic". (Respondents' Brief, p. 22) Burden of proof rulings are hardly semantics. The ruling of the 11th Circuit in Irby v. Bittick, 44 F.3d 949, n.8 (11th Cir. 1995) confirmed that the burden is on the EPA plaintiff to show pretext. Plaintiff's case in Irby was dismissed despite a staggering wage differential of 50%, for what was admittedly equal work, because of the burden that was placed on plaintiff to directly refute the employer's testimony

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[2] The inference to be drawn from a prima facie EPA violation according to the Second Circuit is an inference of discrimination. Belfi v. Prendergast, 191 F.3d 129, 136 (2nd Cir. 1999).

regarding their motivation. Id at 953, n.3 and 954.

The Second Circuit has also shifted the burden back to the EPA plaintiff to show pretext. In Belfi v. Prendergast, 191 F.3d 129 (2nd Cir. 1999) the Court held that while the "burden of persuasion" shifted to the defendant after the EPA plaintiff made out a prima facie case, "once the (defendant) proffered . . . gender neutral explanations to (plaintiff's) claim of "unequal pay" . . . the burden of persuasion shifted back to Belfi to show that the (defendant's) explanations were a pretext for gender based discrimination." Belfi, supra, at 137.[3] The Fourth Circuit similarly has ruled that once the defendant produces "credible evidence of one of the four EPA defenses," the burden of production shifts back to the Plaintiff "to come forward" with evidence of pretext. Brinkly v. Harbaur Recreation Club, 180 F.3d 598, 614 (1999).

The cases cited in both briefs, as well as the rulings of the Court below, demonstrate that the circuit split, regarding the extent to which the burden is shifted back to Plaintiff to

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[3] One thing that almost all of the Circuits seem to have in common, regardless of how they articulate the burden of proof, is the fact that employee plaintiff's are routinely refused their day in Court. The Seventh Circuit noted it affirmed summary judgment for the employer in 21 of 26 employment discrimination cases in 1996. Wollenburg v. Comtech, 201 F.3d 973, 976-977 (7th Cir. 2000). In Wollenburg, plaintiff's case was dismissed after she had made out a prima facie case and after the articulation of the Defendants' "reason other than sex" for the wage differential. Defendants reasons were taken at "face value" without any analysis as to possible inferences or credibility issues. (The employer's asserted reason was that although both the male and female employees had prior unrelated experience, the male employees had more unrelated experience than the female employees.)

demonstrate pretext, is specifically recognized by the Circuits themselves. The split directly affects the outcome in the cases cited. It is hardly semantics.

VI. RESPONDENTS' ARGUMENTS REGARDING THE CREDIBILITY OF THEIR DEFENSE ARE NOT EVEN SUPPORTED BY THEIR OWN BUSINESS RECORDS OR BY THEIR ADMISSIONS IN THE PLEADINGS IN THIS CASE.

It would be difficult for an employer to have ever concocted a greater number of unsupported, ever-changing and conflicting defenses than the ones that have been presented in this case. The inconsistencies alone preclude summary disposition. As stated by the Second Circuit in Belfi v. Prendergast, 191 F.3d 129, 139 (2nd Cir. 1999):

> "Circumstantial evidence in the form of differing and inconsistent explanations from the (Employer) raise questions of fact to rebut its alleged non-discriminatory reasons for the wage disparity, and may provide the jury with a basis to find pretext.

Here, the list of Respondents' falsehoods, inconsistencies and changes in position could fill dozens of pages. In addition to the examples of inconsistencies contained on pp. 4-5, 21-28 of the Petition, consider the following:

- Respondents' claim that a similarly situated male attorney once had the same compensation formula is false. Their records show that that attorney had been hired from a corporation, did not have his own clientele, and was therefore not similarly situated.

The firm transferred him to the standard formula once he had his own clientele.

- Contemporaneous documents refute Respondent's claim that Petitioner only generated $69,000 in prior years. That figure was only the formal billing credit assigned to Petitioner at her prior firm, in addition to which she was bringing two more large clients with additional combined yearly fees of approximately $86,000. (See memo at Appendix L, pp. 98a-99a, of this Reply). Respondents memos projected an additional $50,000 in work for Petitioner from their clients. (Respondents' documents and testimony show identical projected earnings at the time of hire for Petitioner and her male counterpart).

- Respondents' claimed contemporaneous memo asserting that Petitioner was risk adverse is actually a written diatribe "vigorously dissenting" to her hire and containing discriminatory statements about the fact that she had children ("prior commitments").

- Respondents' argument that Bill Coon's discriminatory remarks should be disregarded because he was not at the 5-22-95 meeting is disingenuous. Respondents documents confirm that Coon was the author of the recommendation to the 5-22-95 meeting to continue the substandard compensation formula for a second year.

VII. RESPONDENTS' ARGUMENT THAT THE FOURTH AFFIRMATIVE DEFENSE IS A BROAD, ALMOST LIMITLESS DEFENSE IS CONTRARY TO THIS COURT'S HOLDING IN CORNING V. BRENNAN.

At p. 29, Respondents argue that "EPA's fourth affirmative defense -any factor other than sex- is a broad, catch-all exception that embraces almost a limitless number of factors so long as they do not involve sex." Such a broad based defense would swallow up the Act.

This Court held in Corning that the Act is a broadly remedial act intended by Congress to be liberally construed to further its ends. Congress specified in the legislative history regarding the EPA's fourth affirmative defense that the intended protection for employers was only for the good faith application of their own bona fide compensation policies.

The subject case provides a striking example of how such a limitless "anything goes" defense would thwart the intent of Congress. Respondents here have a rock solid policy regarding their basis for compensation. If the "factor other than sex" defense is construed to be so limitless that employers can successfully meet their heavy burden by asserting a reason that totally disregards their own compensation policies, the Act will not be enforceable.

This was clearly not the intent of Congress with respect to the fourth affirmative defense, as reviewed by this Court in Corning v. Brennan. Consistent with this Court's analysis in Corning, the Court should confirm that the affirmative defense of a 'factor other than sex" must be at least consistent with the employers bona fide method of evaluation and compensation in order to be valid. If, as in this case and in the Corning case, the employer seeks assert a defense that is inconsistent with its own evaluation criteria, then that defense must fail as a matter of law and the plaintiff must prevail based on her prima facie case.

Respectfully submitted,

/s/ _____

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June 2001

APPENDIX J

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Filed August 17, 1998]

No. 97-71559

NANCY L. KAHN,
Plaintiff,

v.

DEAN & FULKERSON, P.C. LARRY M. BOLTON, GEORGE BURNARD, READ A CONE, III, WILLIAM G. COON, JAMES P. DEAN, JOHN L. GIERAK, PAUL R. GILLERAN, JEROME C. GROPMAN, CLARENCE L. HUDSON, JEFFREY L. HUDSON, IAN R. HUNTER, JANET E. LANYON, LAURENCE M. LUKE, THOMAS P. MARTIN, PAUL J. MASTRANGEL, ROBERT L. MERCADO, DONALD A. PIERCE, JR., DAVID L. TENNENT, RICHARD J. TENNENT, CAROL L. VONDALE,
Defendants.

Hon. Bernard A. Friedman

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AFFIDAVIT OF NANCY KAHN

NANCY L. KAHN, being first duly sworn, deposes and says as follows:

1. I am an attorney who was employed by Defendant Dean & Fulkerson during the time period between May 6, 1994 and March 15, 1996.

2. I am the Plaintiff in the above captioned case and if sworn as a witness I would testify in accordance with the statements made in this Affidavit.

3. The factual conclusion reached by this Court on p. 13 of its Opinion and Order Granting Defendants' Motion for Summary Judgment ("Opinion"), to the effect that any pay

differential between Plaintiff and others was based upon Plaintiff's request for a deferral of expenses, is factually inaccurate. I requested a deferral of expenses so that I would not be writing checks to Defendant Dean & Fulkerson during the first few weeks or months until there were receipts to cover the expenses. I testified to this in my deposition as attached at Exh. C. The expense deferral that I requested is consistent with Defendants standard compensation procedure as admitted to by Defendants' accountant, Marianne Sheppard, attached as Exh. A. The expense deferral which I requested is also exactly the same expense deferral that was given to James O'Brien. (Exh. A).

4. The Court's factual conclusion contained on p. 13 of its Opinion, to the effect that the wage differential which Plaintiff experienced resulted from her desire to negotiate a one (1) year contract arrangement, is factually inaccurate. Both Plaintiff and James O'Brien had one (1) year contractual arrangements which were almost identical with the exception of the higher compensation formula that was given to Mr. O'Brien.

5. The Court's conclusion at p. 14 of its Opinion, to the effect that I was offered the firm's standard formula, is false. The firm's standard formula was described to me during first meeting with Defendant Coon, in

accordance with Mr. Coon's deposition testimony (Exh. D). I acknowledged that I was willing to take the risk except for a short term deferral of expenses until there were receipts to cover them, which I later learned was a standard part of Defendant's compensation system (Exh. A and C). Defendant Coon advised me at the initial meeting that he was not sure that the Defendants would offer me the standard compensation initially then returned to me with a reduced compensation proposal for what he called a "developmental period" that would be a year at most. He assured me that at the conclusion of that period I would be placed on the standard compensation formula.

6. The Court's conclusion that I "negotiated" my own contract is not factually correct. The contract offer was made to me on a take it or leave it basis. It included benefits that I had absolutely no use for and which I never received such as medical insurance for one (1) person and furniture. (I had my own furniture which I was planning to and did bring with me).

7. The Court's conclusion at p. 13 of its Opinion that I was fearful that the standard formula could leave me without a paycheck is factually false. I knew for a fact that both the standard and the reduced formula would necessarily leave me without a paycheck for an initial

period of weeks or months. I was not fearful about that eventuality; if I had been I would have never have proceeded to join Defendant Dean & Fulkerson or bring my clients there. Moreover, I had been an equity partner for years and I had been billing clients on my own for a short period of time and, therefore, was comfortable with such uncertainties.

8. In May, 1995, when my contract that was supposed to run for a maximum of one (1) year had expired, Defendants initially deflected my request for the agreed upon elevation to standard compensation by saying that they were too busy to discuss it. Subsequently, they asserted that they would not even vote on the issue of equal pay or shareholder status because Defendant Lanyon had stated that she was upset about a conflict of interest waiver issue that had arisen some six (6) or seven (7) months prior. All of the Defendants with whom I spoke regarding this articulated defense to the lack of equal pay expressed that they did not believe that it was valid complaint.

   a. Defendant Coon stated at the time of the events that Lanyon "better get ready" because he would be asking her for a conflict waiver the same as Plaintiff had if a coverage issue arose with one of his clients.

b. Defendant Burnard opined that the ~~ma~~tter was "routine".

c. Defendant Gropman admitted that the matter "nothing".

d. Defendants Dean, David Tennent, and Larry Luke expressed that they had not even been advised of the substance of the articulated defense.

e. Defendants Dean and Coon refused to permit Plaintiff to attend a meeting or respond in any way to any concerns which they claimed precluded a vote on equalizing compensation.

9. Regarding the statement relating to female staff as "fungible goods", the factual conclusion by the Court that there were both male and female secretaries at the firm at the time this statement was made is factually inaccurate. The statement was made in April, 1994, and there had never been a male secretary at the firm prior to that time. The only male secretary transferred into the firm with an incoming attorney over one and half (1 ½) years later and, on information and belief, left shortly thereafter.

10. Defendant Coon, who made the statement referencing the female staff as "fungible goods" was the Defendant who proposed Plaintiff's reduced compensation formula. He also gave his proxy to Lanyon at the time of the May, 1995 meeting presumably with the knowledge that it would be used in a way that would not permit equal pay or shareholder status for Plaintiff. Moreover, Plaintiff was advised repeatedly that Defendant Coon, as the head of the Professional Personnel Committee, made the determination to recommend a continuation of Plaintiff's substandard wages instead of a proposal for standard compensation. In addition, Defendant Coon rejected all of Plaintiff's requests to respond to the pretextual defense to equal pay, told Plaintiff not to get involved, and suggested that Plaintiff rely on him to "finesse" the situation.

Further, Deponent sayeth not.

/s/_____
NANCY L. KAHN

Subscribed and sworn to before
me this_____.

/s/_____
, Notary Public
, State of Michigan

My Commission Expires:

APPENDIX K

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Filed July 6, 1998]

No. 97-71559

NANCY L. KAHN,
Plaintiff,

v.

DEAN & FULKERSON, P.C. LARRY M. BOLTON, GEORGE BURNARD, READ A CONE, III, WILLIAM G. COON, JAMES P. DEAN, JOHN L. GIERAK, PAUL R. GILLERAN, JEROME C. GROPMAN, CLARENCE L. HUDSON, JEFFREY L. HUDSON, IAN R. HUNTER, JANET E. LANYON, LAURENCE M. LUKE, THOMAS P. MARTIN, PAUL J. MASTRANGEL, ROBERT L. MERCADO, DONALD A. PIERCE, JR., DAVID L. TENNENT, RICHARD J. TENNENT, CAROL L. VONDALE,
Defendants.

Hon. Bernard A. Friedman

SCOTT E. COMBS (P37554)
Attorney for Plaintiff
27780 Novi Road
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Novi, MI 48377
(248) 380-5050

DANIEL J. BRETZ (P34334)
BRADY HATHAWAY, P.C.
Attorneys for Defendants
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Detroit, MI 48226
(313) 965-3700

AFFIDAVIT OF NANCY L. KAHN

NANCY L. KAHN, being duly sworn, deposes and says as follows:

1. I was an attorney employed by Defendant Dean and Fulkerson during the time period between May, 1994 and March, 1996.

2. When I first contacted the Defendants regarding employment, I was advised by Defendant Mastrangel that the firm had a minimum requirement of a $300,000 'book of business' in order to qualify and that the firm was not interested in me because I did not meet that qualification. I later learned that there was no such qualification and that very few of the male employees, including the replacement

environmental attorney, could meet any such qualification.

3. After I was subsequently hired at a reduced level of compensation for the first year, I requested that Defendant Lanyon request a conflict of interest waiver from her client, Amerisure, based on a potential insurance coverage issue that was developing regarding an environmental site with respect to which I had been representing one of my regular clients for some time. When Lanyon delayed repeatedly in asking for the waiver, I brought the matter to the attention of Defendant Bill Coon in accordance with Firm policy. Defendant Coon advised me at the time that he realized that these types of conflicts would develop from time to time with Amerisure because of it was a large business insurer and the firm had a large business clientele. He advised Plaintiff that Lanyon had "better get ready' because he would be asking for the same thing if a similar situation arose with one of his clients. He expressed no concern regarding any letter send by Plaintiff.

4. Subsequently, two other Defendants contradicted the asserted pretext by referring to the situation as 'nothing' and as 'routine'.

5. Plaintiff never worked with any of the Defendants referenced in Defendant Cone affidavit and never would have had occasion to

work with them in the future because they were labor lawyers.

6. Plaintiff was never permitted to attend any of the 'team' meetings referenced in Larry Luke's deposition.

7. Plaintiff was never permitted to attend any 'shareholder' meetings at the firm, although there were periods of time when plaintiff was the only attorney excluded from those meetings and they were attended by 'associate shareholders' and in some cases non shareholders such as attorney James O'Brien.

8. Plaintiff was placed on a floor with mostly administrative staff and very few attorneys.

/s/_____
NANCY L. KAHN

Subscribed and sworn to before
me this_____.

/s/'_____
, Notary Public
, State of Michigan

My Commission Expires:

APPENDIX L

MEMORANDUM FROM NANCY KAHN TO BILL COON

[Dated March 29, 1994]

To: Bill Coon
From: Nancy Kahn
Re: Requested Billing Information

1. 1993 - Billable and contingent hours: 1,360
- Non-billable hours: 446

Total 1,764

(Note: non-billable hours were very high in 1993 because of merger negotiations and litigation supervisiion)

2. 1993 - Contributing attorney fees billed: $171,491

3. 1993 - Billing attorney fees received: $69,601
1992 - Billing attorney fees received: $64,925

4. In addition to the clients for which I have billing responsibility, I will be bringing 2 others, at a minimum.

a. The first additional client just started a large environmental project scheduled to be

completed 1999. The bills for that project alone I would anticipate to run $2,000-$3,000/month (e.g., Jan was $4,544 and Feb. was $3,283).

In addition, the client is a PRP at several Superfund sites and is self-insured at the Mich. plant up to the first $1 million.

b. The second additional client is starting a large remediation project. It had one Superfund site problem that is of major significance. We recently billed them $50,000 for mostly environmental and some partnership work. This client's work should wind down in the next year if things go well for the client.

5. I am guessing that this will add up to $100,000 in billing in the next year, but that is by no means assured.

Please let me know if you have questions or need additional information.

Nancy